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EARLY HISTORY OF THE ENGLISH JUDICIARY.[1]

In our last number, we noticed the appearance of a new work by Lord Campbell, upon the Chief Justices of England. This work is a valuable addition to legal bibliography, and deserves careful study. It has, perhaps, been hastily prepared; but no one can deny that it contains a stock of valuable information, and that it is written in a chaste and elegant style. Some ideas have been suggested by its perusal, which we would fain preserve. The constitution of the court of king's bench; — its origin and history; — the varied fortunes of its long line of presiding judges, from Odo to Mansfield; — the influence of the laws and customs of the realm upon such a tribunal; — the reciprocal influence of such a tribunal upon such a country, — are all subjects of historical interest. To statesmen and lawyers alike, such studies are interesting; for, while the former are forced to admit the importance of a judicial department to a perfectly organized government, the latter cannot fail to see that the duties of a high tribunal of justice extend far beyond the adjustment of daily disputes between man and man, to the investigation and elimination of principles as important to the

[1] The Lives of the Chief Justices of England. From the Norman Conquest, till the Death of Lord Mansfield. By John Lord Campbell, LL. D., F. R. S. E., author of "The Lives of the Lord Chancellors of England." In two volumes. Boston. Charles C. Little and James Brown.

organization of great nations as to the harmony of families and neighborhoods.

The court of king's bench has experienced repeated changes since its organization. These changes we shall rapidly review; and, in passing, we shall briefly notice the lives of some of those, who, to use Mr. Burke's significant figure, may be appropriately styled "the pillars and landmarks" of that bench. But our attention will be more especially directed to the early history of the court, for that period was far the most important in determining its character. Let us then recur to the origin of the office of *chief justice* or *chief justiciar*.[1]

This office is well known to be of Norman origin. It was introduced by William the Conqueror, and, like most of his innovations, the change was extremely unpalatable to his Saxon victims. The Saxons, as Lord Campbell remarks, entertained a great dislike for any system of centralization. It was their policy to distribute power as far as practicable. Hence arose their system of tythings and hundreds. These divisions were judicial as well as political. Each had its separate court and local magistrate. Higher in authority, were the county courts, generally held by an earl or alderman; while, above all, was the august Witenagemote, where cases of the greatest importance and difficulty were determined by the representative wisdom of the nation.[2] It was the natural design of the Conqueror

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[1] The term *justiciar* never suited the Englishmen. It was too Norman. In Scotland, it was less obnoxious. There is now in that country, a *Court of Justiciary*.

[2] The New England people are very fond of comparing themselves to the Anglo-Saxons. This may be a weakness, but it is clear that many of their customs betray a Saxon origin. In nothing is this more observable than in the early judicial institutions of Massachusetts. The jurisdiction which, under the Saxon dynasties, was vested in the Witenagemote, was vested under a Puritan dynasty in the great and general court of assistants; and the local courts, such as in the days of Alfred had been held in each tything or hundred, were held here by local magistrates and such other persons as the *freemen* of the county might designate, with the consent of the general court. 1 Hutch. Hist. Mass. 397. The courts of star chamber and high commission, as well as all courts of chancery and ecclesiastical jurisdiction, they utterly repudiated, and so offensive to the puritans was the idea of a central judicial power that writs were never issued in the king's name, nor in fact in the name of any sovereign power whatsoever. They read simply, "*You are required*," &c. The authority of the court which issued them was thought sufficient. Another and more memorable instance of this bitter jealousy of centralism, was the outbreak of indignation when the news arrived that a vicegerent of the chancery was to come to the Massachusetts; when, in resistance to a common danger, even John Endicott and Roger Williams could act in concert; and when the torn and trampled banner of England demonstrated, with a terrible significance, the resolution of our ancestors to transact their own business in their own way.

to interrupt such a system, and to concentrate in the lord paramount, not only the title to the soil and the claim to the military services of his subjects, but also to establish the principle always maintained by the monarchs of Southern Europe, that the sovereign was the source of all mercy and justice, and that from him alone must emanate all authority in matters judicial, as well as executive or legislative. This was an interruption of long cherished rights, more obnoxious even to the Saxons than the abolition of allodial tenures. It was therefore asserted with caution, and maintained with difficulty. In later times, the ambitious spirit of Thomas à Becket having secured for the possessor of the great seal, an authority superior to that of the chief justiciar, the dangerous tendency of the Norman policy became more evident; but the steadfast opposition of the earls and barons to the encroachments of the chancery, as well as the disastrous termination of Becket's career abundantly disclose the nature and extent of that feeling, which, though pent up for successive generations, was destined, like some terrific fire damp, to burst forth with irrepressible energy.

Another unfortunate attendant of this Norman innovation was the important influence secured by this new system to the Romish priesthood. Under Saxon rule, the local courts were generally controlled by persons of secular avocations, who had the same stake in the welfare of society, with their neighbors. And in the Witenagemote, the suitor, though somewhat threatened by the "*civium ardor prava jubentium*," appeared always before justices whom no "*vultus instantis tyranni*" could terrify. But not so under William's favorite system. To perfect that system, and to secure dignity and influence to the great fountain head of all law and justice, it was fitting that its vicegerents, if they necessarily lacked a proper familiarity with the habits of the conquered country, might yet dazzle the Saxon swine-herds by their erudition and mental discipline. In those days, intellectual accomplishments were monopolized by catholic priests, and the priests had become thorough converts to the system of centralism by daily noting the operation of the magnificent machinery of the catholic church. Of all the systems which human ingenuity has ever devised, based upon the principle of a centralization of authority and judgment, this must be acknowledged to be the grandest. It is now in the nine-

teenth century of its existence. All other human institutions of equal antiquity, have witnessed their successive seasons of freshness, maturity, and decay, and have passed from the earth. Schisms, heresies, and reformations have threatened it in vain. It has survived the elegant skepticism of Languedoc, the blunt common-sense of England, the fervid indignation of Wittenburg, and the obscene and blasphemous infidelity of Paris. At divers times, its acknowledged head has been trampled on and disgraced. But all the efforts of temporal potentates to check its progress have proved futile. Even now, although the Vatican is vacant, the church maintains its authority and dignity alike in republican America and in imperial Austria.

We have digressed, perhaps. But, to understand the origin of the judicial system of England, it is essential that we should appreciate the influence of the catholic church. The introduction of the central judicial system of William the Conqueror was a triumph of that church. Many of the early chief justiciars were active ministers of its faith. The first of the line was an eminent catholic. Of him we wish to speak. But first, let us briefly set forth the constitution of the *aula regis*, or as it is termed in the reign of her present majesty, the court of queen's bench.

The *aula regis* derived its name from the hall where the court was held. It was composed of the chief officers of the household, the constable, the mareschal, the seneschal, the chamberlain, and the treasurer, over whom the chief justiciar presided. The functions of the latter were not purely judicial. In the absence of majesty, he was entitled to vice-royalty. He commanded armies in addition to presiding in courts. He took precedence of all the nobility, and as chief conservator of the peace of the realm, he was entitled to the dignity of coroner-general, which is still appurtenant to his office.

The first chief justiciar was equal to his post. This was Odo, the son of Herluin, a Norman knight. His mother was no other than the beautiful tanner's daughter, the concubine of Robert of Normandy, and the mother of the Conqueror himself. Odo was not destitute of that violence and energy which characterized his brother, and with a vigorous mind and a strong taste for athletic pursuits, he readily lent himself to the study both of letters and of arms. Bishop of Bayeux at an early age, he de-

voted himself to the cause of the church militant, and to the promulgation of the apostolic faith. At Hastings, he performed the mass, and then, exchanging the chalice for a marshal's baton, he mounted his charger at the head of the Norman cavalry. To the achievements of that day he owed his judicial eminence, and for fourteen years he continued to combine the incongruous characters of judge, prelate, and general. Then, corrupted by ambition and avarice, he mingled in political intrigues, which, after various vicissitudes, resulted in his imprisonment and banishment. He died in poverty at Palermo.

His successors were not unlike him. Many were fighting bishops,[1] corrupt and cruel, and without judicial reputation. One prince of the blood attained to the office, — he, who was afterwards Henry II., renowned for his controversy with Becket. To Ricardo de Luci, who succeeded him, England is indebted for the "*Constitutions of Clarendon.*" It was also in this reign that a most important change was effected in the judicial system, by the appointment of justices itinerant, or justices of the forest. Under the Saxon practice, as we have seen, the local courts had an extensive jurisdiction. Under the Norman system, every thing must be tried in *aula regis*, or wherever the king happened to be. The itinerant system, not very unlike the present system of travelling the circuit, was adopted as a middle course, and a new set of judges were appointed to discharge its duties.

The first chief justiciar of eminent judicial reputation was Ranulfus de Glanville.[2] He, too, fought as well as judged. While high sheriff of Yorkshire, he led the *posse comitatus* against William the Lion, whom he captured at Alnwick, and carried in triumph to Falaise. Subsequently becoming chief justiciar, it became his duty, in the absence of his king, to defend the marches of Wales. In the discharge of this duty he strengthened his reputation as a soldier and statesman. The feverish excitement of the crusades found Glanville advanced in years, but enfeebled neither in body or mind. Discharging with fidelity and eminent success the peaceful duties of his office, it would hardly be thought that he would have been overcome by the

[1] One was called "the pride of the Normans and the scourge of the English."
[2] Author of "*Tractus de Legibus et Consuetudinibus Regni Angliæ.*

spirit of such an age. But the hero of Alnwick and Glenwellyn was not to be tempted by luxurious ease. The obligations of loyalty awhile detained him; but when his old sovereign, who had implored him to retain his office, expired with a broken heart, he availed himself of the opportunity to precede his fiery and disobedient son, to those oriental battle fields, where the latter won the proud surname of Cœur de Lion. The chief justiciar fell at Acre.

Such was Glanville, who is now chiefly known as a black-letter veteran, not often referred to, but theoretically held in great esteem. In the discharge of his duties as judge, he was involved in the melancholy domestic broils of a licentious sovereign, and this has caused him to be accused of that immorality too prevalent in his time. But there is every reason to believe that to that energetic and chivalrous character which he maintained even to his illustrious death, there was united a purity and simplicity in private life, which is the infallible sign of true greatness. It is hard to blend the idea of an eminent lawyer with that of a successful soldier, but the early military services of Glanville were in the discharge of an office of peace, not war, and the strong excitement which tempted him to Palestine, overwhelmed, in its time, the stability of Europe, and originated in stern religious enthusiasm.

Our limited space compels us to hurry from Glanville to Bracton. Among the intermediate chief justiciars were Hugh Pusar, bishop of Durham, an ecclesiastic of licentious youth, and meritorious middle age, but who died the victim of excessive avarice; William Longchamp, better known as a lord chancellor under Richard I.; Walter Hubert, archbishop of Canterbury, ambitious and tyrannical; Geffrey Fitzpeter,[1] a most learned and independent baron; Peter de Rupibus, a crusader like Glanville; Hubert de Burgh,[2] Hugh Bigod, Hugh le Despencer, and Philip Basset. But few of them led tranquil lives, and many died violent deaths. How unlike modern times! Now the position of a judge is one of quiet dignity. But the judges of those times were happy if they were not summoned from the bench to the battle field; or if, failing to comply with

[1] Geffrey Fitzpeter was the judge who tried *Faulconbridge* v. *Faulconbridge*. See Shakspeare's play of King John. Act I. Scene I.

[2] King John, Act IV. Scene IV.

the requisitions of a capricious tyrant, they escaped ignominious death. They were also exposed to unusual temptations. Many of them were convicted of gross corruption; nay, so proverbially low was the judicial character, that they were usually suspected, as a matter of course, of the grossest moral delinquencies.

When Bracton was elevated to the bench, its character and jurisdiction had become somewhat changed. The chancery had attained its full glory. The court of common pleas was fully organized. The doctrine of the king's presence in his courts was reduced to mere theory. Westminster Hall had been built, and although the court was still held to be ambulatory, and the writs made returnable "wheresoever we may be in England," still suitors rarely went elsewhere than to a few large towns. The concentration of the courts in this edifice, which has conduced so much to the grandeur of the English bench and bar, had then been fairly accomplished. But it was, notwithstanding, one of the most benighted periods in English history. Civil war had long been the order of the day. The struggles of John and the barons had enervated the kingdom, and the post of chief justiciar, being necessarily allied with that of generalissimo, afforded little scope for judicial excellence. Such an alliance had, however, existed for the last time, in the case of Philip Bassett, who is said by some to have been the last who ever bore the name of chief justiciar. Whether this be so or not, Henry de Bracton was the first ever selected to sustain an unmixed judicial dignity.

For the honor of the English law, we may well rejoice at such a distinction of such a man. The name of Bracton shines forth from that long line of fierce and knavish judges, with a brilliancy increased by the dimness of the background. His most enduring monument is that which he executed himself. Like the work of Glanville, Bracton's treatise has lost its practical value by the lapse of time. But the dust of centuries cannot obscure its merit. It bears unmistakable signs of a liberal and expanded mind, as well as of thorough and elegant education. The strength and majesty of our vernacular tongue had not been developed. Consequently, Bracton was driven to the Latin. But the purity of Blackstone's English is not more noticeable than the almost Augustan elegance of Bracton's Latin.

A chief *justice*[1] was appointed by Henry III. in the latter part of his reign, whose career certainly deserves notice. By some he is looked upon as the last of the old line, by others as the first of the new. As he left office before Edward I. had remodelled the judicial system, he may with some justice be classed with the old school; but as he was the first justice, except Bracton, who was a mere civilian, it is obviously unjust to associate him with the fighting bishops who succeeded Odo. We refer to Robert de Bruis, or Brus,[2] a member of a distinguished Norman house, and closely allied with the royal family. In the third generation his family has become immortalized by its representative on the field of Bannockburn, and the name is proudly associated with all that is glorious in Scotland. Bracton was the first upon the common-law bench of England, who had attained reputation as a learned jurist, but De Bruis seems to have been the first who, according to the modern standard, aspired to be a great judge. He enjoyed the advantages of a good education, and when he succeeded to his father's title, instead of taking to the field, and emulating the feudal greatness of his ancestors, he quietly devoted himself to the study of that profession, in which it was his sole ambition to rise. Upon the accession of Edward I. he was passed over, whereupon he left for Scotland, and the history of the remainder of his life is identified with the history of the dissensions between England and Scotland.

With Edward I. began a new era in the judicial history of England. The time had now come when it was necessary to amend many of the abuses which had crept into the system of William of Normandy. The system itself never had the confidence of the great body of the English people. For, however temporarily successful the Conqueror and his dynasty may have been in riveting upon the people of England the feudal code of the Continent, it is nevertheless true that there was an undercurrent of popular feeling which could not be wholly suppressed. And of no class had the people become more tired and jealous than of their new-fashioned ministers of justice. Under the Sax-

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[1] Lord Campbell states that this incumbent was the first who was styled "CAPITATIS JUSTICIARIUS AD PLACITA CORAM REGE TENENDA," the modern designation of the chief justice of the court of of queen's bench.

[2] In modern times spelt *Bruce.*

on system, a judge was held to an impartial discharge of his duties. Under that of Normandy, the office of judge was a prize for royal favorites and intriguing priests. Its duties were executive rather than judicial, military rather than intellectual. Of such office-holders, the people were tired, but in the then social organization of the realm the popular voice was unheeded by those in power. Nor was it in fact until the intrigues of Simon de Mountfort had alarmed even the monarchs themselves, that attention was seriously called to their encroachments.

Under these peculiar circumstances Edward I. commenced his judicial reform. He was admirably calculated for the task. Resolute but prudent, arbitrary but discriminating, he attacked at once the military and ecclesiastical influences which had controlled the bench. The common-law jurisdiction was divided between the three tribunals of the present time. The chancellor was secured in the first position of precedence among the great officers of state, and he alone was permitted to retain any power not purely judicial. The appellate jurisdiction was secured to the parliament. In fact, the basis upon which the judicial institutions of England were then established remains with but little alteration to the present day. A change occurred at this time whose practical operation is more noticeable than that of almost any other. We refer to the policy of selecting judges from the laity, a purpose to which Edward adhered very tenaciously. The Inns of Court had gradually attained a respectability, and he decided to appoint his judicial officers from their societies. This policy has since been resolutely lived up to, and we need not add that it has exerted an influence of inappreciable importance upon English jurisprudence.

Thus we have striven to give some idea of the early history of the great court of England, previous to its final permanent organization. Of course, it is mainly an abstract of Lord Campbell's work. Hereafter we may refer at more length to some of the great names which have since adorned that bench; more especially to the career of that great man, whose whole judicial experience confers such glory upon English jurisprudence — Lord Mansfield. We have read Lord Campbell's work with great pleasure, but not with entire satisfaction. It is full

of pleasant reminiscences, and contains a vast fund of valuable information, but it lacks generalization. It is said that history is the essence of innumerable biographies. If that be so, it is reasonable to assume that such a series of biographies should aspire to the dignity of history. This merit cannot be claimed for Lord Campbell's work. It is not enough to state the succession in which certain judges occupied the bench, with the casual statement that one was a Scotchman and another an Irishman, but most clearly it would be proper to go somewhat into the state of the law at each period, the nature of the great questions which were agitating the state, and the influence of which is always perceptible upon the course of jurisprudence. Lord Campbell alludes only in the briefest manner to the efforts of the Romish priesthood to obtain and to preserve the control of the courts, and to the excessive popular jealousy of a central system of judicature — two points which immediately arrest the attention of the most careless student of the early judicial history of England. Neither do we think that he presents in any thing like its genuine colors, the important political influence of the administration of justice under Jeffries or under Lord Hale. Yet what a study is presented in the different course of these two! The criticism which we would make on Lord Campbell's work is somewhat like the criticism of Mr. Macaulay upon Mitford's History of Greece, that it is not enough merely to narrate events, but that an author with his superior facilities for research, and with the beautiful panorama fresh in his mind's eye, is bound to describe impressions as well as to report the names of objects which he sees. Such a defect is attributable, perhaps, to the manifest haste in which this work has been prepared. It is also attributable to one unfortunate influence of the study of the English law in the manner in which it is generally pursued. English lawyers are too apt to be mere "case-lawyers," — to settle questions of law by a sort of legal algebra, in which the different cases are as so many *unknown* qualities, which by being added, subtracted, multiplied, or divided, may be made to secure definite results.

Recent American Decisions.

Supreme Court of Pennsylvania, May Term, 1849, at Harrisburg.

COMMONWEALTH *v.* STAUFFER.[1]

Conditions in restraint of marriage are valid in devises of real estate.

Testator devised his real and personal estate to his wife, provided she remained a widow for life; but in case she married again, she was to leave the premises. If she remained a widow for life, the testator devised all his property, after her death, to his father and mother, if living; if not, to others. The land was sold for payment of debts, and the widow married. The testator's father died before the marriage of the widow: His mother is entitled to recover the surplus proceeds of the real estate.

IN error from the common pleas of Lancaster.

Case stated. The question being the right to the surplus proceeds of the real estate of William Geigley, the younger, which had been sold under an order of the orphans' court, for payment of debts. His will was as follows: —

"I will and bequeath to my loving wife, Susan Geigley, all my real and personal estate that I am possessed of (with a few exceptions that I will hereafter bequeath to my brother George,) provided my wife Susan remains a widow during her life. But in case she should marry again, my will is, she then shall leave the premises, and receive all the money and property she had of her own, or that I received of hers. . . . It is my will and desire, that my wife remain a widow during her life on the premises, that after her death, all the money and property that I got or had of my wife's, shall be paid to her friends, whomsoever she wills it to; and all the property belonging to me as my own at my death (not including my wife's part) I will and bequeath to my father and mother, if living. But if they are both deceased, my will is, that my brother George Geigley, and my sister Catharine Geigley, shall have the whole of that share or part that was my own, to them, their heirs, and assigns for ever."

The sale was made to defendant in April, 1834. William

[1] This case is reported 10 Barr, 350.

Geigley, the elder, the father of testator, died in January, 1835. In that year Susan Geigley, the widow of the testator, married. Ann Geigley, his mother, died in 1847, and the question was, whether her administrator was entitled to the proceeds of the sale of the real estate in the hands of the purchaser. In 1834 William Geigley, the elder, received a sum of money from the defendant, as the true balance of the proceeds of the real estate, and executed a release to Susan Geigley, who had become the purchaser of the land. Susan Geigley also released to the defendant in 1834.

Lewis, P. J., (after stating the will).—"The real estate was sold for the payment of debts, under an order of the orphans' court, and the widow having married a second husband, the present action is brought by the representatives of the testator's mother, (who survived her husband,) to recover the balance of the proceeds of sale in the hands of the defendant. There are other facts upon this record, which are thrown out of consideration, because the case is determined exclusively on the question arising upon the condition in restraint of marriage. A distinction has been supposed to exist, certainly more inveterate than rational, in favor of *limitations* as opposed to *conditions* of this description, but a review of the cases on which this distinction is supposed to exist, is dispensed with, because the case before us is the case of a *condition*. It may not be amiss, however, to remark, that the vice-chancellor of England, so late as November, 1846, without taking notice of the supposed distinction in favor of *limitations*, held in general terms, that 'all *limitations* in restriction of marriage were objectionable:' (Elizabeth Castle's case, L. Jurist, Dec. 26, 1846.) A condition *precedent* stands on peculiar ground, and has been sustained upon the technical principle that the estate does not vest until the condition is performed. But the decisions on this branch of the law are also thrown out of consideration, because the case of this record is that of a condition *subsequent*. The estate has vested, and is not divested by a disregard of the condition, if the latter be against the policy of the law. The adjudications on conditions requiring the *consent* of *parents* or *others standing in their place*, stand also upon a principle not involved in the case before us. There may be circumstances to justify a reasonable restriction of this nature, to guard youth-

ful indiscretion against imposition. But wherever no sufficient reason exists for withholding consent, or the consent itself is required for the purpose of restraining the marriage, the condition is disregarded, (2 Atk. 261; Amb. 662.) A restraint even for six years, without any justifiable reason for it, has been considered as falling within the prohibition, (10 East, 22.)

"It has been held that a devise over to a secondary devisee, upon the violation of the condition, was a circumstance which would justify the courts in sustaining conditions of this kind. This circumstance cannot relieve a condition in restraint of marriage from the objections founded upon the great principle of public policy involved; and it is rapidly losing its power, as the light breaks upon the judicial mind. It has been held that a residuary clause, or a devise over without a particular description of the property to pass by it, will not enable the courts to enforce the forfeiture. A devise over to the heir-at-law will be equally inoperative, (6 Mass. 169.) A devise which does not *create* an interest to take effect *immediately* upon the happening of the contingency, will be equally ineffectual, (Ib.) The decisions in which these principles have been announced, may be regarded as the vigorous struggles of the common law to free itself from a doctrine resting upon no substantial foundation. But we are not controlled by the cases on this branch of the subject, because we have here no devise over upon the happening of the forbidden contingency. The devise over presupposes the enjoyment of the estate by the widow '*during her life*,' and is to take effect, *not upon her marriage*, but '*after her death*.' Distinctions resting upon the question whether the legacy is payable out of the *real* or *personal estate*, are said to exist. But Mr. Justice Kennedy, in an able opinion delivered in the case of *Middleton* v. *Rice*, (6 Penn. Law Jour. 234,) cites from Mr. Jarman's edition of Powell on Devises, vol. 2, 291,) the opinion there given, that 'even in regard to the real estate, it seems generally admitted that *unqualified* restrictions on marriage are void.' And the learned judge further remarks, that 'this is the universal opinion entertained by judicial men on this point,' (6 Penn. Law Jour. 234.)

"It may well be doubted whether the English decisions, so far as they in any respect countenance restrictions upon marriage, are applicable to the exigencies of a newly established

nation. Possessing an extent of uncultivated territory almost unlimited, and relying upon the increase of population as the chief element of national strength, it would seem to be the policy of this country to discountenance every restraint upon that legitimate intercourse which results in the reproduction of the human race. Our ancestors may be considered as having brought with them the wholesome doctrines of the common law, without the embarrassments produced by departures from its principles, under the constraint of circumstances peculiar to a country already overstocked with inhabitants. A principle which generally governed the common-law courts is, that 'if a portion be given in consideration that the daughter should *never* marry, such a condition will be rejected as repugnant to the original institution of mankind.' (Com. R. 729.) And the doctrine which prevailed in the ecclesiastical courts was, that 'all conditions against the liberty of marriage are unlawful, as being a restraint on the natural liberty of mankind, and an hinderance to the propagation of the species.' (4 Burns's Ecc. Law, 152.) Marriage is a wise regulation, in harmony with nature and religion, and is the only efficient preventive of licentiousness. The happiness of the parties and the interests of society require that it should be free from either coercion or restraint. Bonds to procure, and contracts and conditions to restrain, are alike forbidden. It is the appropriate regulation of that great instinct of nature which was designed by the Creator to replenish the earth. It is upon this authorized union that all civilized nations depend for their prosperity in peace, and their defence in war.

"The principle of reproduction stands next in importance to its elder born correlative, self-preservation, and is equally a fundamental law of existence. It is the blessing which tempered with mercy the justice of expulsion from Paradise. It was impressed upon the human creation by a beneficent Providence, to multiply the images of himself, and thus to promote his own glory and the happiness of his creatures. Not man alone, but the whole animal and vegetable kingdom are under an imperious necessity to obey its mandates. From the lord of the forest to the monster of the deep — from the subtlety of the serpent to the innocence of the dove — from the celastic embrace of the mountain kalmia to the descending fructification of the lily of the plain, all nature bows submissively to this primeval

law. Even the flowers which perfume the air with their fragrance, and decorate the forests and fields with their hues, are but 'curtains to the nuptial bed.' The principles of morality — the policy of the nation — the doctrines of the common law — the law of nature and the law of God — unite in condemning as void, the condition attempted to be imposed by this testator upon his widow.

Judgment for the defendant.

Heister and *Parke*, for plaintiff in error. Conditions in restraint of marriage are operative in devises of real estate, (1 Rop. on Leg. 327; 1 Stor. Eq. 285 – 8; Amb. 209; 7 Conn. 568; 3 Wh. 575; 1 Atk. 380.) And the courts incline to support them where the intent is obvious, (10 W. 148; 2 Barr, 301; 4 Ib. 102.) Here there was a devise over. The release of the widow enured to the benefit of the estate, (1 Pet. C. 373.) The proceeds of land pass as the land, (Acts 1834, § 19, 1833, § 18.) The devise over was to the survivor, at the termination of the particular estate, (9 W. 349; 7 L. J. 360; 1 W. & S. 160.)

McElroy, contrà. This is a condition in restraint of marriage, and as such forbidden by law, as well in the case of real as personal estate, (1 Stor. Eq. 288.) The only restrictions on marriage allowed by the law, are those dictated by the soundest policy and the purest morality, (1 Fonb. Eq. ch. 1, § 4, n. 10.) A devise over, which operates in restraint of marriage, is void, (Hoopes *v.* Dundas, *ante*, 75.) The property is purely personalty: 11 S. & R. 234; 4 Barr, 363. It was paid to the husband of the present claimant's intestate. After an estate has been settled by agreement, this is not to be disturbed: 7 W. 71; 6 W. 161.

Gibson, C. J. This action is brought for surplus proceeds of land devised to the testator's widow, for life, on condition not to marry; but sold by order of the orphans' court, for payment of his debts. She did marry shortly after the sale; and the question is, whether a subsequent condition, in general restraint of marriage, when annexed to a devise of land, is void, for reasons of public policy. When annexed to a legacy, the decisions

of the ecclesiastical courts, followed in chancery, have certainly established that it is; and so the rule is held in Pennsylvania, both at law and equity, as is shown by *McIlvaine* v. *Gethen*, (3 Whart. 575,) and *Hoopes* v. *Dundas*, (*ante* 75.) But, it is said, in 2 Powell on Dev. 282, that the rule of the ecclesiastical courts in legatory cases are inapplicable to devises of land, or money charged upon it; and that it owes its existence, in any case, to the ecclesiastical judges, who borrowed most of their rules from the civil law. The same thing is repeated in 1 Jarman on Wills, 836, and fortified by references to *Reeves* v. *Herne*, (5 Vin. 393, pl. 46); *Harvey* v. *Aston*, (1 Atk. 361); *Reynish* v. *Martin*, (3 Atk. 330); *Stackpole* v. *Beaumont*, (3 Ves. 96); and the cases collected in Mr. Sanders's note to *Harvey* v. *Aston;* to which may be added the great case of *Fry* v. *Porter*, (1 Mod. 308.) The ground on which these precedents stand, is the indisputable fact that devises of land are governed, not by the Roman, but by the common law. Yet a mistaken notion has been entertained, that restraint of marriage, to be valid in a devise of land, must not be general; but that it would bring such a devise to the level of a bequest of chattels, and abolish the distinction between legacies and devises altogether. Yet the notion has received color from the very same text-writers, who, in 2 Powell on Dev. 291, and 1 Jarman on Wills, 843, have asserted that, even in regard to devises of land, it seems to be generally admitted (by whom?) that unqualified restrictions on marriage are void, on grounds of public policy; though the point rests, they say, rather on principle than decision. I know of no policy on which such a point could be rested, except the policy which, for the sake of a division of labor, would make one man maintain the children begotten by another? It would be extremely difficult to say, why a husband should not be at liberty to leave a homestead to his wife, without being compelled to let her share it with a successor to his bed, and to use it as a nest to hatch a brood of strangers to his blood. Such is not the policy of the statute of wills, which allows a man to devise his land "at his own free will and pleasure;" nor is it the policy of the common law, which allows him to give his property on his own terms, or not at all; and, if he might not do the one, he would assuredly do the other: so that it is not easy to see how the cause of population would be promoted by binding his

hands. To throw the widow of a landless merchant on her dower at the common-law, would not do it. It may be the present policy of the country to encourage reproduction — though the time will certainly come when excess of population will be a terrific evil here, as it is elsewhere — but no political regulation, which looks no further than inducements to second marriage, will either advance or retard it.

It is therefore hard to discern the policy that has been glanced at by the text-writers. It may seem to them, as it did to the judge who ruled the cause below, that a condition in general restraint of marriage is contrary to an instinct of our nature, which it would consequently be sinful to oppose. But the intercourse between the sexes is a legitimate subject of civil regulation; for the land would be filled with violence and blood if it were not. It would be impious, if it were possible, to suppress it; but a gift on condition not to marry leaves the donee free as air to do any thing, at pleasure, but divert it to uses for which it was not intended. The truth is, the notion is the product of the Roman law, adopted as it was, with modifications, by the ecclesiastical judges; and how far the Romans were driven, by waste of life in their ceaseless wars, civil, servile, and foreign, to force the growth of population by concubinage as well as marriage, and by the imposition of a mulct upon celibacy, is matter of school-boy history. But that the rules thus borrowed have not been eventually applied by the common-law courts to land, is shown by *Goodright* v. *Glazier*, (4 Burr. 2512,) in which it was ruled that a prior uncancelled will is not revoked by a subsequent cancelled one; a precedent followed by this court in *Flintham* v. *Bradford*, (*ante* 82.) In *Harvey* v. *Aston*, (Comy. Rep. 729,) it was indeed intimated that the rule of the ecclesiastical courts, in regard to conditions, ought to be followed by the other courts, for the sake of uniformity; the absurdity of which was forcibly exposed by Lord Rosslyn, in *Stackpole* v. *Beaumont*, (3 Ves. 89.) "In deciding questions that arise on legacies out of land," said he, "the court, very properly, followed the rule which the common-law prescribes, and common sense supports, to hold the condition binding where it is not illegal. Where it is illegal, the condition would be rejected, and the gift pure. When the rule came to be applied to personal estate, the court felt the difficulty, upon the supposition that the

ecclesiastical court had adopted a positive rule from the civil law, upon legatory questions, and the inconvenience of proceeding by a different rule in the concurrent jurisdiction (it ought not to be called so,) in the resort to this court, instead of the ecclesiastical court, upon legatory questions; which, after the restoration, was very frequent, and, in the beginning, embarrassed the court. Distinction upon distinction was taken to get out of the supposed difficulty. How it should ever have come to be a rule of decision in the ecclesiastical court, is impossible to be accounted for but on this circumstance, that in the unenlightened ages, soon after the revival of letters, there was a blind superstitious adherence to the text of the civil law. They never reasoned, but only looked into the books, and transferred the rules, without weighing the circumstances, as positive rules to guide them. It is beyond imagination, except from that circumstance, how, in a christian country, they should have adopted the rule of the civil law, with regard to conditions as to marriage."

So much for the support which the notion receives from principle; and now for the support which it receives from precedent. For the latter, we are referred to the supposed inclination of Lord Ellenborough's mind, in *Perrin* v. *Lyon*, (9 East, 183,) thought to be intimated by his remark on a condition not to marry a man of Scottish birth, that he "saw no ground to hold the condition to be void, as being in general restraint of marriage;" whence an inference that he would have done otherwise, though the gift was of realty, had the restraint not been special. He said no more, however, than that the limited terms of the condition relieved him from the necessity of deciding the broad question; from which no more can be inferred than that he may have thought it a debatable one. The *nisi prius* opinion of our late brother Kennedy, in *Middleton* v. *Rice*, (6 Penn. L. Jour. 234,) is more formidable, not only because of his great learning and experience, but because it furnishes the only direct authority for the notion that is to be found in the English or American books. But it is directly opposed by a solemn decision of this court in *Bennett* v. *Robinson*, (10 W. 348.) True, that was the case of a conditional limitation; but, if it were contrary to the law of nature, it would be equally inoperative as a condition, either in respect to land, or in respect to a legacy;

it could not be good as to the one and bad as to the other. But whether the restraint be by limitation or condition, is, in a vast majority of cases, the effect of accident, depending on the turn of expression habitual to the scrivener, who seldom knows any thing of the technical difference between them. If the rule of the ecclesiastical courts were applicable to land, it would be easily evaded by using words of limitation instead of words of condition; and thus it would have no greater effect on devises in restraint of marriage, than the statute of uses had on trusts, which worked a change only in the words necessary to create them.

The difficulty in the application of the common-law rule to the case before us, is the want of an entry to determine the widow's estate for the condition broken, which is generally necessary to divest a freehold, though not to divest a term for years. Here, however, an entry was impossible, for the land was sold before the widow's marriage. Had the condition been broken before the decree, there might have been an actual entry, though perhaps even then it would not have been indispensable; but, since it has been converted, her right to the money substituted for the land, is extinguished by the simple adverse claim of it. Her administrator, therefore, is not entitled to recover.

Judgment reversed, and judgment rendered for the plaintiff for $334, and costs of suit.

District Court of the United States for the Western District of New York, at Buffalo, Nov. 27, 1849.

JACOB T. MERRITT ET AL. *v.* EDWARD SACKETT ET AL.

The jurisdiction of the court of an action *in personam* in favor of material-men doubted, and its exercise declined.

THE facts and circumstances of the case are stated in the opinion of the court.

CONKLIN, J. This is an action *in personam*, on the admiralty side of the court, instituted under the act of congress, of February 26, 1845, conferring a quasi-admiralty jurisdiction upon the district courts of the United States, in certain cases arising out

of the commerce and navigation of the lakes. The suit is for the value of certain articles of ship-chandlery sold by the libellants, who are dealers in such articles, having their place of business in the city of New York, to the defendants resident at Sackett's Harbor, in this district, alleged to have been designed for use, by the defendants, in the completion and fitting out of the schooners Arkansas and Alabama, at the latter place.

A warrant of arrest having been issued and returned executed, it is now, on the return day of the process, objected, in behalf of the defendant, that the court has no jurisdiction of the case, and that the defendant ought therefore to be discharged from arrest, and the libel dismissed. The objection is founded on the domestic character of the vessel, and I am the more anxious explicitly to state the grounds of the conclusion at which I have arrived, because it is at variance with what was said by me some months ago, when called on to decide upon the admission of a libel of a like nature with this. My answer in that case to the application of the proctor for an order directing process to issue, was as follows: —

"Whether this suit is maintainable is a question which has not yet been directly decided by the supreme court. The admiralty jurisdiction of the American courts of suits *in personam*, by material-men for labor, materials, and supplies, in a home port, was however distinctly asserted by Mr. Justice Story, in delivering the opinion of the court in the early case of the *General Smith*, (4 Wheat. R. 438,) and follows as a necessary consequence of the doctrines constantly asserted and acted upon by him in his circuit. The principle upon which he is well known to have uniformly insisted, is, that the admiralty jurisdiction *in personam* extends to all maritime contracts; and the contract in question is clearly of that character — whether in the case of a domestic or of a foreign vessel. It is upon this ground alone that the admiralty takes cognizance of liens in favor of material-men, given by state laws, for repairs and supplies furnished in a home port. Several of the judges of the supreme court, in dissenting opinions, and at the circuit, have controverted this general principle; but it has been uniformly acquiesced in and repeatedly applied by the majority of the court, as it has also been by several of the district courts.

Under these circumstances, I do not feel at liberty to decline

to take cognizance of suits *in personam*, in favor of material-men in the cases of vessels embraced by the act of congress, although the services may have been rendered, or the materials or supplies furnished, at the place of the owner's residence."

In the foregoing review of the question, it will be seen, no reference is made to rule 12th, of the rules prescribed by the supreme court of the United States in 1845, to regulate the practice of the courts of the United States, in cases of admiralty and maritime jurisdiction. In fact the rule was then altogether overlooked. It is as follows: —

"In all suits by material-men, for supplies, or repairs, or other necessaries for a foreign ship, or for a ship in a foreign port, the libellant may proceed against the ship and freight *in rem*, or against the master or owner alone *in personam;* and the like proceedings *in rem* shall apply to cases of domestic ships, where, by the local law, a lien is given to material-men for supplies, repairs, or other necessaries."

The direct object of this rule was to prescribe, or declare, the various forms of remedy, to which those known in admiralty jurisprudence as material men, shall have a right to resort for the enforcement of their claims. It is one of a series of rules, by the others of which it is immediately followed, having the like object in relation to other subjects of admiralty jurisdiction. The latter branch of the rule authorizing a suit *in rem* for supplies furnished to a domestic vessel, where by the local law a lien is given, may not necessarily require a construction which would exclude a farther remedy *in personam* — though there is strong color for such an interpretation, according to the legal maxim, *expressio unius exclusio est alterius.*

But these rules imply a consciousness, on the part of the judges of the supreme court, of the right, and, indeed, of the necessity, of exercising, to some extent, what savors strongly of discretionary authority, in determining the limits and conditions of this branch of the jurisdiction of the American courts: and no one who is familiar with the uncertainty and difficulty by which the subject, as left by the constitution and the judicial act of 1789, was environed, and the discussions to which it has given rise, can fail to perceive the impossibility of excluding considerations of expediency altogether from the inquiry. This is a point of some importance in the present case, because,

although the general principle has been incidentally asserted on several occasions by the supreme court, that all maritime contracts fall within the scope of the admiralty jurisdiction, (and the contracts of material-men are reputed to be of this description,) yet what was said in the case of the *General Smith*, (4 Wheat. R. 438,) as to the right of the material-man to sue *in personam* in the admiralty, was but an *obiter dictum*, and in the subsequent case of *Ramsey* v. *Allegre*, (12 Wheat. R. 611,) the court expressly waived any decision upon the question of this right, and one of the judges, in a very elaborate opinion, unequivocally denied its existence.

Under these circumstances, it seems not unreasonable to suppose, that the supreme court thought proper, if not absolutely (by implication) to repudiate the remedy *in personam* in the case of domestic vessels, at least to reserve the question for future consideration. The contract of marine insurance is also, so far as I can discern, undeniably a maritime contract, and as such, was very naturally held by the late Mr. Justice Story, to be comprised within the admiralty jurisdiction of the courts of the United States. Still, in no instance, it is believed, out of the first circuit, has a suit in the admiralty been maintained or instituted on this species of contract; and in the case of *The New Jersey Steam Navigation Company* v. *The Merchants Bank of Boston*, (6 Howard's R. 344,) the distinguished counsel for the libellant, though arguing in favor of a comprehensive admiralty jurisdiction, expressly disclaimed its existence in the case of marine insurance. In order, however, to justify this disclaimer, it became necessary for him to qualify the general principle above mentioned, affirming the admiralty jurisdiction over all contracts in their nature maritime, and virtually to limit it to these for the *performance of maritime services*.

But the principle thus restricted, would exclude material-men, as well in the case of foreign as of domestic vessels, and also bottomry bonds, which have at all times been admitted to be within the admiralty jurisdiction, even in England. If, therefore, policies of insurance are to be excluded from the admiralty jurisdiction, the exception, so far as I am able to discern, will be purely arbitrary; and yet the impression seems to be generally entertained, that the supreme court is not likely, if the question should ever be brought before it for decision, to uphold the admiralty jurisdiction over this species of contract.

With respect to the remedies for materials or supplies furnished for a vessel in her home port, it is also to be observed, that it is only in virtue of the lien given by a state law, that the admiralty jurisdiction is held to attach at all; and if the question had not already been determined, it might be worth while to consider, whether it would not be better to leave such liens to be enforced in the state tribunals alone. But the ground on which the established doctrine rests, is, that while the lien given by the local law is to be regarded as in its nature maritime, and therefore to be enforced by admiralty process, yet that no lien is given by the general maritime law — the contract being but an ordinary transaction between the parties residing in the same place, and the exigencies of commerce not requiring that any lien should be implied. Would it be absurd, then, to hold the contract to be one with which the maritime law has no especial concern, and which therefore confers no right to resort to a maritime court for its enforcement?

Without pursuing the inquiry further, my conclusion is, that the omission in the rule above cited, of any mention of a remedy *in personam* in favor of material-men in a home port, was made *ex industriâ*, and was designed to be significant. For this reason alone, therefore, I deem it more safe and discreet, for the present at least, to abstain from the exercise of this jurisdiction. There is another consideration also connected with the subject, which, under existing circumstances, is fitted to awaken additional caution in dealing with this question, and which might, perhaps, not improperly, in some degree, influence a decision upon the propriety of assuming a doubtful authority. To render the remedy in question more effective than a suit at common law in a state court, resort must be had to the process of arrest against the person of the defendant; and it was doubtless in the hope of deriving superior advantage from the employment of this form of process, that the libellants have seen fit to come into this court at all. But imprisonment for debt, by means of process issued from the state courts, having in this state been abolished by law, its continuance, through the process of the national courts, in cases of admiralty jurisdiction, is regarded with jealousy and distrust. In a recent case, the legality of such process from this court was denied, but was upheld by the court. And in the present case, as I am informed,

a writ of *habeas corpus* has been sued out by the defendant before one of the state judges, on the ground that the process of arrest was not warranted by law. Collision between the state and national authorities is always to be deeply regretted, and no enlightened and patriotic functionary can be insensible to the duty of carefully abstaining, as far as he can consistently with paramount obligations, from all acts likely to lead to so deplorable a result.

Supreme Court of Vermont, Addison County, February Term, 1849.

EXECUTORS OF HAMBLIN CONVERSE *v.* ERASTUS CONVERSE.

A lower degree of intellect is requisite to make a will than to make a contract. But in the former case, something more is required than mere *passive* memory. There must be an active power to collect and retain the elements of the business to be performed, for a sufficient time to perceive their obvious relation to each other.

THIS case came before the supreme court upon exceptions to the instructions of the chief judge of Addison county court, at the December term, 1848. The case was then heard upon an appeal from the probate court allowing the will of Hamblin Converse. The executor having made formal proof of the will, the defendant offered evidence tending to show that the testator at the time of making his will, was about seventy years of age, and that as early as 1844, he was afflicted with a disease of the brain, and that it was incurable and progressive, and that he lost all sense for some months before he died; and the opinion of physicians was introduced to show that the testator might do common business with which he was familiar, but that he would not be able to enter into any new or complicated business, and that no reliance could be placed on the action of his mind.

The executor offered evidence tending to show that the testator at the time of making the will, and before and after, was of sound mind and capable of transacting all kinds of business.

The defendant requested the court to charge the jury that if the testator was feeble in body and mind, and subject to a disease of the brain which was continuous and progressive, and

his memory and mind were so impaired that he could not act upon important business with reason and judgment, he was incapable of making a will.

But the court, among other things not objected to, stated to the jury that the will in question must depend upon the fact whether the testator had sufficient mental capacity to execute the will in question, at the time it was executed; and that to give the will effect, he must then have been of sound disposing mind; but that this does not in any way imply that the powers of the mind must not have been weakened or impaired by disease or old age: and in regard to the degree of capacity, which the jury must be satisfied the testator posesssed at the making of the will; the court told the jury that it would not be sufficient that he might be able to comprehend and understand a question which might be propounded to him, and answer it in a rational manner, nor was it necessary that he should have such a capacity of mind as would justify his engaging in complex and intricate business of life; but the jury must be satisfied, in order to justify them in establishing the will, that the testator when he made it was capable of knowing and understanding the nature of the business he was then engaged in, and the elements of which the will was composed, and the disposition of his property as therein provided for, both as to the property he meant to dispose of by his will, and the persons to whom he meant to convey it and the manner in which it was to be distributed between them; and if they found all this, then it should be found that he had sufficient capacity to make the will in question, but otherwise not.

The jury returned their verdict establishing the will and after judgment on the verdict, the defendant appellant excepts to the above instructions of the court to the jury and prays that his exceptions may be allowed and the cause pass to the supreme court.

These exceptions were allowed and the case ordered to the supreme court, where it was argued by

John Pierpont and *Asahel Peck*, for plaintiffs.
H. Seymour, *Linsley* and *Beckwith*, for defendants.

The opinion of the court was delivered by

REDFIELD, J. The subject involved in this case is one of some difficulty. It is not easy to lay down any precise rule as to what exact amount of mental capacity is sufficient to enable one to dispose of property by will. The rule laid down by the judge in this case, in summing up to the jury, seems to have been rather a medium one, rather sensible and judicious, and if we reversed the judgment, we could hardly expect to prescribe a safer or more intelligible one. Every man will have his own mode of expressing the thing. The rule of one is very little guide to another.

I have myself usually told a jury in these cases, that less mind is ordinarily requisite to make a will, than a contract of sale, understandingly, for the reason that in contracts of sale there are usually two parties and some degree of antagonism between their interests and efforts. So that here mind is opposed to mind, and consequently it is somewhat more difficult to see clearly the joint bearing of all the relations presented, than under the common circumstances of making a will, where one is left free to act upon his own perceptions merely. But this is not always the case in making a will. One may be beset by an army of harpies, in the shape of hungry expectants for property, altogether more perplexing than the ordinary circumstances attending a disposition of property by sale.

But it may be safe no doubt, to affirm, that in making any contract understandingly, one must have something more than mere *passive* memory remaining. He must undoubtedly retain sufficient *active memory*, to collect in his mind, without prompting, particulars, or elements, of the business to be transacted, and to hold them in his mind a sufficient length of time to perceive, at least, their more obvious relations to each other, and be able to form some rational judgment in relation to them. The elements of such a judgment should be, the number of his children, their deserts, with reference to conduct and capacity, as well as need, and what he had before done for them, relatively to each other, and the amount and condition of his property, with some other things perhaps. The capability of men in health, to form correct judgment in such matters, is no doubt very unequal, and when there is no inherent incongruity in the will itself, and no just ground to suspect improper influence, juries are, and perhaps should be, very liberal in sustain-

ing testamentary dispositions. But there must undoubtedly be some limit. When one is confessedly in a condition to be constantly liable to commit the most ludicrous mistakes, in regard to the most simple and familiar subjects, he ought not and cannot make a will. Judgment affirmed.

Abstracts of Recent American Decisions.

Court of Appeals of South Carolina, November Term, 1849, *at Columbia.*

Brooks v. *Bobo.* A note under seal, payable to Samuel Brooks or bearer, and by him refused to be accepted; and afterwards transferred by the first obligor to other persons, without the consent of the obligors, was held not to be a legal and valid instrument, entitling the plaintiff to recover upon it, *as there was no legal delivery.*

Cooke, administrator, v. *Cottrell.* The judge may, in his discretion continue a case after the trial has commenced, to permit the plaintiff to have the certificate by which an exemplification of a record on which plaintiff's debt defended, amended.

Smith v. *Mundy.* 1st, an offer to pay a debt, for which A. is the security of C., but which offer did not constitute a tender, will not discharge the surety, although by the plaintiff not accepting his offer, he may have lost the means of indemnification. 2nd, to be a tender, there must be an unconditional offer to pay, and a payment into court of the money tendered.

Black et al. v. *Ramey*, (late sheriff, and his securities.) *J. A. Bowie et al.* v. *the same.* The lands of intestates were sold for partition, under the order of the court of common pleas — bonds were given to the sheriff, for the purchase money; he collected and paid out part; part he collected and had not paid it over. It was held to be a breach of his official bond, in not paying over the same, on demand; and although some was collected before due, this did not alter the case.

Allen v. *Ramey*, (late sheriff, and his securities.) A printer's bill for advertising for the sheriff, is not covered by his official bond.

Devore v. *Mundy.* M., to whom, or bearer, B.'s note was payable, being about to negotiate it to J., in order to induce him to take it, wrote his name at its foot, beneath the former maker — held, that it was a good note to bearer, and that he was liable to pay it. A contract with an intermediate holder to give time to the principal, does not discharge the surety as against another *bonâ fide* holder.

Murphy v. *Antley.* The defendant said of the plaintiff, "I expect Murphy will have plenty of bacon to sell, as he had killed some of my hogs,"— were held to be enough to sustain the action, after the jury properly instructed, found that the defendant intended, by their use, to charge the plaintiff with hog-stealing. Motion in arrest of judgment, or for new trial, dismissed.

The Bank of Hamburg v. *Ray.* W., the commercial agent of J., signed, as surety, the name of J. per W., agent, to the accommodation note of H. It was held, that having no power from his principal to so sign, *he* became personally liable. Motion for non-suit, or new trial, dismissed.

State v. *Posey.* 1. In laying the murder committed by a slave, against the accessory, it is not necessary to lay it against the form of the statute. 2. A murder committed by a slave, is a common law offence. 3. The death of the principal (especially when a slave, and murdered by the accessory,) is enough to put the accessory on trial, and dispenses with the conviction of his principal. 4. A person may be accessory to his slave, in the commission of a felony. 5. A conviction on two counts, charging the death of the murdered woman (the prisoner's wife) to have been brought about by beating, and drowning, is not inconsistent and absurd, inasmuch as both these means were employed in producing death, and either, equal to that event.

State v. *Posey.* In this case for the murder of his own slave, by whom, his (the prisoner's) wife had been killed, at his, (the prisoner's) solicitation it was held: 1st. That the circumstances of the wife's death might be given in evidence, as furnishing a motive to the murder of the slave. That the conviction of the prisoner, resting on the proof of the accomplice, corroborated as it was, by positive and much circumstantial evidence, was proper.

Gaudey v. *Yancey.* The discharge of the first indorser, by two subsequent indorsers, makes them equally liable for their maker's debt. The second indorser having paid one moiety of the debt; it was held that the third, the plaintiff, who paid the other moiety, could not recover against the second, the defendant.

Mosely v. *Graydon.* 1st. The court declined to decide on a ground for a new trial, when the party disclaimed any such result; they, however, were inclined to adopt the ruling of the judge below, that when the defendant objected to one of the commissioners, named in a commission to examine witnesses out of the state, but did not name one in his place, the execution by the commissioner, unobjected to, was well enough.

2nd. One administrator may lawfully indorse a note belonging to their intestate.

3rd. A writing, which sets out, that the party signing it, has delivered it (the note) to the plaintiff, for collection and that if he fails to collect it by due diligence, and that he (the party so signing it,) will pay to the plaintiff the debt and interest, is a good indorsement.

4th. Such a writing, though written on a separate paper not annexed to the note, nor attached to its back, is, if it identifies the note by a de-

scription, satisfactory to the court and jury, a sufficient indorsement. *Frost J.*, dissented.

Valk v. *Gaillard*, administrator. Notice to the attorney, of an indorser of an accommodation note; where he was empowered to make and indorse notes, as renewals, to receive moneys standing in the bank, to the credit of the principal, and generally to do every thing necessary, is not enough to charge the indorser.

McCracken v. *Ansley*. 1. The definition of an arrest, that it consisted in "some corporal touching; some physical detention of the person," is right.

Parol may be admitted to explain a date even in a deed, or other written contract, much more so, *then*, the date of a sheriff's return of a *ca. sa.*

A. F. Posey, relator, v. *J. Ramey*, and his sureties. Under the act of 1846, the sureties of a sheriff in his official bond, executed before it, are not liable to the penalty of five per cent. a month, imposed by that act on a sheriff who withholds money after demand.

Capeheart v. *Carrodine*. 1. A witness called to prove character, who had no knowledge of the plaintiff, and his only knowledge of her character was derived from letters written after the commencement of this suit, to persons who knew her, and their answers, was properly excluded from testifying to such facts. 2. The charge, that reports to affect the plaintiff's claim to damage for the breach of a promise of marriage, ought to rest on a good foundation, was right.

Goode at al. v. *Hubbard*. *The same* v. *Thomas Hennaghan*. In these cases, it was held 1st. That in detinue, a detention and use of the property, as defendant's property, after the accrual of the plaintiff's right, was enough to sustain the plaintiff's action, without a demand and refusal. 2nd. That a condition in a deed, conveying slaves to furnish the donor with a decent support during life, is not a condition precedent to the vesting of the estate.

Strom v. *Christie*. The only objection raised, was, that the administrator on the estate of S. P. was not shown — no such objection was raised on the circuit. It was spoken of by the attorneys, that G. W. P. was the administrator, and this was understood by the judge below to be undisputed, and here it is not pretended that the fact is not so; or that the date of the letters of administration would enable the plaintiff to protect his title against the mortgage, under which the defendant as sheriff, seized the property. It was held that the objection could not now be made.

Richardson v. *Provost et al.* The agent was examined by the attorneys out of court. He proved that he had the power of the plaintiff to make the contract sued. No objection was made at the examination on account of the non-production of the power. It was held that such objection could not be taken at the trial.

Williams v. *M'Creary*. The location of the land according to both grants — was supported by the jury. It was held, 1st. That a line extending the defendant's claim beyond the grant, though claimed by the defendant and others, from whom he derived title, but which had been to some

extent denied by the plaintiff, and those under whom he claimed, could not be set up against the finding of the jury. 2nd. That the defendant's possession, although up to the line under which he claims, but outside of the plaintiff's line could not give title by adverse possession.

Williams v. *Lanneau*. *The same* v. *Laurens*. In the first of these cases, (dower,) the respondent was served with a copy of a summons, claiming dower in O. O.'s lot — this was of little value; he was in possession as the tenant of the respondent, in the 2nd case, of the mansion house and lot which adjoined O. O's. lot, in the town of Aiken. The summons served, was handed to the landlord, who directed an appearance, which was entered; afterwards, supposing it to be of too little consequence to contest the claim of dower in O. O.'s lot, the appearance was withdrawn. The demandant went on, under the original summons, which was for the mansion house, and issued her writ of admeasurement of dower for the mansion house and lot, obtained an assessment for a large sum in lieu of dower — which was confirmed March, 1849. Motions to set aside all the proceedings in the first case, and to extend the judgment against Lanneau to the other respondent, Laurens, were made at October term, 1849, and refused. It was held by the court of appeals, 1st. that a petition was not necessary to authorize the issuing of a summons in dower; that an appearance was a legal showing of cause against the right of dower, and thereupon a declaration should be filed, and the right thus tried upon issues properly made up — and according to their disposition, the writ of admeasurement of dower is granted or denied. 2nd. That the court of law, had power to look behind the judgment, and afford relief, 3rd. That the course of practice pointed out in *Posey* v. *Underwood*, (1st Hill, 263,) *Dial and Henderson* ads. *Farrow*, (1st M'Mull. 292,) ought to have been pursued, but as no objection on that account was made, the court gave judgment on the merits. 4th. That the respondent, Lanneau, was not legally a party to the judgment in dower, and therefore, that all proceedings should be set aside. Motion in Lanneau's case was granted; in Laurens's it was denied.

Golson v. *Hook and wife*. The deceased A. and his sons, the plaintiffs, occupied the same plantation, on which each cleared and cultivated a part — the deceased said he had given the land to his sons, and on one occasion, he cleared and gave up a field, saying it was his sons' — they the plaintiffs had possession for more than ten years, in the lifetime of the deceased — held not to be enough to constitute such adverse possession, as would give them title to the whole tract.

Under the will not executed according to the statute, although the plaintiffs had possession for more than ten years after their father's death, yet, inasmuch as some of his heirs were and are minors, the statute could not prevail.

Buchanan v. *Buchanan*. 1. B., administrator of J. B., (deceased,) who was the executor of W. B., (deceased,) admitted in stating his accounts before the ordinary, that a legacy left by the will of W. B. to his son, was a debt due by his intestate, and a sum sufficient of the assets was left in his hands to pay it. This was held to be enough to charge him,

as administrator, with its payment at law. 2. The statute began to run from such settlement before the ordinary, and the defendant having continually admitted the debt, to a short time before action, it was held such admissions prevented its operation.

English v. *Spikes*. Defendant for a valuable consideration, passed to the plaintiff a note under seal which had been paid to him; assigning it in writing and waiving, in such assignment, demand and notice. It was held that, the fraud and deceit were made out in the fact of passing of a note, which had been previously paid to him.

Rucker v. *Frazier*. 1. The note sued on, was due, 4th February, 1841; partial payments were made by the defendant from 17th April, 1842, to 22nd February, 1843, amounting to $1,600. On the 28th March, 1845, the defendant by letter, promised to pay any balance due. The writ was issued 1st March, 1848; it was held, that the statute of limitations could not protect the defendant. 2. That a verdict found for the defendants, against the admission of the defendant, Frazier, in the letter of February, 1843; and the positive evidence of a witness, White, cashier of the Ruckersville banking company, who swore that $1,600 were all the credits to which the note was entitled, was set aside and a new trial ordered.

Maybin v. *Kirby*. A note made by defendant, indorsed by S. B., and at his request indorsed by the plaintiff for the use of W. C., was discounted in the Commercial Bank, Columbia; was protested for non-payment, and notice regularly given. Money afterwards to pay it was raised in the Branch Bank, on the note of the plaintiff. W. C., F. H. E., and W. H., indorsed it, and it was secured by a deposit with plaintiff of a certificate of stock, in the South Carolina Manufacturing Company, belonging to W. C. — the money was drawn on the plaintiff's check, and the note in the Commercial Bank paid and delivered to the plaintiff, the last indorser. At the request of the plaintiff's attorney, it was *especially* submitted to the jury, to say whether the plaintiff was the agent of W. C., in these transactions; and whether the money raised in State Bank, was W. C.'s money? The jury affirmed these questions by finding for the defendant. It was held, that their verdict could not be disturbed.

Jones and wife et al. v. *Weathersbee*. 1. The plaintiffs had recovered, in a former case against this defendant, for overflowing their land with water. In that case, the defendant would have defended himself by shewing title out of the plaintiff's ancestor, M. — and in J.; he failed to do that. On this occasion he offered to produce a deed, existing at the former trial, to shew that M. had conveyed to J. It was held, the former recovery concluded it. 2. Jones, one of the plaintiffs, conveyed his wife's interest, after the former recovery, to the defendant; this came out on the defendant's proof; a non-suit could not therefore be ordered — no such motion was made on the circuit, or here. The defendant had all the effect of Jones's conveyance, which he could have had, under the circumstances, in mitigation of damages. Motions to reverse decisions on demurrers, for non-suit and for a new trial, were dismissed.

Norris v. *Graves*. The plaintiff sued, by the name of A. O. Norris;

the defendant pleaded in abatement, that this was not his true christian name, which was Andrew O. The plaintiff replied, he was known by that name as well as the other. It was ruled, 1st, that A. O., is no name at all. 2d. That the plaintiff must know and state his true name, and therefore his replication could not cure the defect. 3d. That such a replication is only good when the plaintiff mistakes the defendant's true name. Exceptions were recognized — 1st. if the note had been made payable to A. O., the plaintiff, then this might have precluded the defendant's plea; or 2d. if the note had been signed A. O., then, as a defendant, he might have been so sued.

Potts v. *Cauble.* The goods of plaintiff had been sold under *fi. fa.* several years ago, and purchased in by Peter Cauble, who left them with the plaintiff's wife for life; after her death, W. A., by the authority of Peter, took them away. Held that the plaintiff had no cause of action. Motion for a new trial dismissed.

Spencer v. *Bedford.* Conversations between grantor and grantee, shewing the consideration of a deed, and had at the moment of execution, may be given in evidence, in reply, to explain the fact elicited by the cross examination of a witness, called to prove the execution of the deed, who said he saw no money pass.

Mavry and son v. Schroder. 1st. In an action on the case, a recovery cannot be had on a contract so as thereby to charge a dormant partner with a debt of the firm. 2nd. A statement in account, that defendants, as partners, bought goods on credit, then fraudulently denied the partnership, and the ostensible dealer transferred to the other the goods, is no cause of action. 3d. In case, on a fraud, whereby the plaintiffs allege, that their whole debt is lost, it is immaterial, whether it was due or not, at the commencement of the action. 4th. The defendant would have given in evidence, the record of a mortgage executed to him by his brother; although this was collateral to the issue, yet it was held, he must account for it, by shewing the destruction or loss of the original, before the secondary proof could be let in. 5th. The statement, that one of the defendants, and he who contracted the debt with the plaintiffs, fraudulently assigned to the other defendant, his whole estate, to defeat the plaintiff's debt, and this fraud was consummated by collecting the choses, selling and removing the goods, is not *per se* enough to entitle the plaintiffs to recover. The motion for a new trial was granted, with leave to the plaintiffs to amend by adding a count or counts to his declaration.

Crews v. *Mims.* The wife of the defendant, who is incapable from weakness of understanding or of making a contract, took up goods from the plaintiff. There was no proof, *that they were necessaries* — it was held that the plaintiff could not recover.

State v. *Lewis*, the slave of Peter Hare. 1st. The slave had been convicted of a capital felony — a new trial was ordered — two mis-trials succeeded. It was contended before the judge, who ordered the new trial, and who ordered a 4th trial, that the previous *mis-trials*, ought to operate as acquittals. He overruled that ground, and ordered the trial. It was held, that an appeal was premature — it could only be allowed, if at all

allowable, after verdict and an appeal to the circuit judge. 2nd. There *generally* is no appeal from a judge's order, granting or refusing a new trial, in the case of a slave, convicted of a crime.

Ramsay et al. v. *McBryde & Posey.* R., one of the firm of R. and T., was indebted to M. and P., and being about commencing business with T., he promised them that his individual debt should be taken out of whatever their account to the firm should be. The defendants M. and P., accordingly contracted an account with R. and T., who failed and made an assignment. The assignee brought suit on the account of R. and T., against M. and P. They pleaded that it was paid by an account against R. under the agreement. It was held that it could not have such effect unless R. knew and assented to the arrangement.

Abstracts of Recent English Decisions.

House of Lords. Before LORDS CAMPBELL, BROUGHAM, and other Lords.[1]

Burnes v. *Pennell*, July 16, 1849. *Joint Stock Company — Partnership — Agency — Paying Dividends out of Capital — Fraud — Conspiracy.* A purchaser of shares in a joint stock company set up as a defence to calls, and as a ground to have the purchase rescinded, that he was induced to purchase in consequence of representations of the law agent of the company as to its prosperity, when it was known to the directors and officers of the company that their affairs were in a very ruinous state, alleging also that several times large dividends had been fraudulently made, when the company (an insurance company) had not only made no profits, but had sustained heavy losses, which were concealed from the shareholders and the public. *Held*, 1st, that the company were not bound by the representations of a law agent as to the state of their affairs, although that law agent was a shareholder. [There is a difference between joint stock companies and mercantile firms.] 2nd, that general allegations of fraud committed at periods considerably antecedent to the purchase, is not a ground to rescind a sale. Per *Lords Campbell and Brougham*: If directors have made false representations, in order fictitiously to enhance the price of shares for their own benefit, and a party is thereby grossly deceived, the transfer of the shares, although expected, ought to be set aside. A gross fraud is practised, in silently making a dividend, where no profits have been made, for which the directors are civilly liable, and for which they may be prosecuted as conspirators. 13 Jur. 897.

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[1] The Lord Chancellor was ill.

Before the LORD CHANCELLOR, *Lord* LYNDHURST, *Lord* BROUGHAM, *and Lord* CAMPBELL.[1]

Bekham v. *Drake et al.*, July 27, 1849. *Bankruptcy — Contract for personal service — Penalties — Assignees.* B., the foreman of C. and D., type-founders, entered into a written contract to serve them as foreman for seven years. They, on their part, agreed to employ him as foreman for seven years, and it was specified that upon breach of the covenants, the party in fault should pay to the other £500, by way or in the nature of specific damages. C. and D. dismissed B. before the expiration of the seven years, and subsequently to such dismissal, B. became bankrupt. *Held*, that the right of action in respect of the damages or penalty having accrued before B.'s bankruptcy, and the damages relating rather to the property than to person, feeling, or character, &c. of B., the right of action in respect of the damages passed to the assignees in bankruptcy of B. 13 Jur., 921. See *Smith* v. *Coffin*, (2 H. Bl. 451); *Hancock* v. *Coffyn*, (8 Bing. 358); *Wright* v. *Fairfield*, (2 B. and Adol. 727); *Gibson* v. *Caruthers*, (8 Mee. and W. 321); *Clark* v. *Calvert*, (3 B. Moo. 96); S. C. (8 Taunt. 742); *Rogers* v. *Spence*, (12 Cl. & Fin. 700; 13 Mee. & W. 580); *Laird* v. *Pim*, (7 Mee. & W. 474); *Chippendale* v. *Tonlinson*, (Cook's Bankrupt Law. 260); *Chamberlain* v. *Williamson*, (2 Man. & S. 408); *French* v. *Brooks*, (6 Bing. 354); *Bownce* v. *Dobson* (1 Atk. 155); *Raymond* v. *Fitch*, (2 C. M. & R. 588); *Williams* v. *Chambers*, (*Dom. Prec.*); *Crofton* v. *Poole*, (1 B. & Adol. 568); *Benson* v. *Flower*, (Sir W. Jones, 215); *Vicars* v. *Wilcocks*, (8 East, 1); *Hilary* v. *Morris*, (5 C. & P. 6); *Brewer* v. *Dew*, (11 Mee. & W. 625.)

Before Lord BROUGHAM, *Lord* CAMPBELL, *and other Lords.*

Benson v. *Chapman*, July 27, 1849. *Insurance — Abandonment — Agency — Master of Ship.* Plaintiff's ship and homeward freight being insured, she took in her cargo at Pernambuco for Liverpool; leaving P., on her voyage she struck upon a rock, and was obliged to put back for repairs; the repairs proved very expensive, the outlay considerably exceeding the value of ship and freight. The captain raised the necessary sum of bottomry of the ship, freight, &c. The ship was under repairs from June to the following January, when she took in her former cargo, and sailed for Liverpool, which place she reached safely, and freight was paid to the obligees of the bottomry bond. Plaintiff, on the 30th December, being informed of the probable amount of the repairs, gave notice of the abandonment of the ship and freight to the respective underwriters, and did not afterwards

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[1] The following judges were called in: — WILDE, C. J.; PARKE, Baron; MAULE, J.; ROLFE, Baron; WIGHTMAN, J.; CRESSWELL, J.; ERLE, J.; PLATT, Baron, and WILLIAMS, J.

[2] The following judges were called in: — ALDERSON, B.; PATTESON, J.; COLERIDGE, J.; COLTMAN, J.; MAULE, J.; WIGHTMAN, J.; CRESSWELL, J.; ERLE, J.; WILLIAMS, J.

interfere in respect of either ship or freight: *Held*, affirming the decision of the exchequer chamber, reversing that of the court of common pleas, upon an action on the policy in respect of freight. 1. That the captain continued to be the agent of the plaintiff in the matter of repairs; and that plaintiff, being bound by the election of the captain to repair; and the freight insured against having been actually earned, could not recover for the whole or partial loss of freight. 2. That the proportion of the expenses at Pernambuco which the freight ought to bear, being claimed as lost freight, and not as money paid by way of average or salvage, plaintiff was not entitled to recover those expenses on this form of action. 13 Jur. 969.

Privy Council.

Bank of Bengal v. *McLeod*, July 19, 1849. *Indorsement — Power of Attorney — Agent — Pledge.* A power of attorney having been given by the payee of notes, to agents, empowering them to sell, indorse, and assign, they, under the power, indorsed the notes to a bank, by way of security for a loan to them. The agents failed: *Held*, that the transaction was valid, and that the payee could not recover from the bank. 13 Jur. 945.

Court of Chancery.

Follett v. *Jeffreys.* Nov. 6, 1849. *Production of Documents — Privileged Communications.* Where a bill impeached a deed on the ground of fraud, and the defendants, by their answers, admitted the possession of documents, some of which were confidential communications between the defendants as solicitor and client, and others, cases and opinions of counsel, and all of them were distinctly sworn by the answers to have been written and taken in contemplation of proceedings being instituted in respect of the matters in question in the suit — *Held*, that the documents were not privileged as being connected with the acts complained of. There is no such distinction upon the authorities. See *Cromack* v. *Heathcote*, (2 B. & B. 4;) *Blenkinsop* v. *Blenkinsop*, (10 Beav. 143,) *Sawyer* v. *Burchmore*, (3 My. & K. 512;) *Desborough* v. *Rawlins*, (3 My. & C. 515.)

Rolls Court.

Walker v. *Milmo.* March 12, 1849. *Mortmain act — Dock and Canal Shares — Bonds.* Shares in joint stock, canal, and dock companies, are not within the statute of *mortmain;* neither are bonds given by such companies under the power of their acts for raising money by mortgage. 13 Jur. 933.

Wood v. *Taunton.* April 4, 1849. *Award.* Where all matters in dispute in the cause are referred to arbitration by an order of court, it is not

necessary that the award of the arbitrator should be made a rule of court, in order to give the court jurisdiction to act upon it. 13 Jur. 954. [See *Marquis of Ormonde* v. *Kinnersley*, (2 Sim. & S. 15); *Sibley* v. *Saffel*, (Ib.); *Haggett* v. *Welsh*, (1 Sim. 134); *Turner* v. *Turner*, (3 Russ, 494); *Wilkinson* v. *Page*, (1 Hare, 276); *Salmon* v. *Osborn*, (3 My. & K. 429); *Harney* v. *Shelton*, (7 Beav. 455.)]

The Attorney General v. *The Corporation of London*. May 5, 1849. *Costs of Attorney General.* There is no rigid rule in equity that the attorney general suing in behalf of the crown, neither receives nor pays costs. And where the defendants to an information took exceptions to the master's report, finding their answer insufficient, and certifying that they ought to pay the costs, and paid the usual deposit to answer costs, and the exceptions were overruled, the court ordered them to pay the costs of the attorney general. 13 Jur. 973. [See *Rex* v. *Miles*, (7 T. R. 867); *Hallett* v. *King of Spain*, (2 Bligh, N. S., 31); Hallock on costs, 18; 2 Fowler's Ex. Pr. 371; 3 Bla. Com. 400; *Rex* v. *Hassell*, (13 Price, 279); *The Attorney General* v. *Lord Ashburnham*, (1 S. & S. 394); *Duke of Brunswick* v. *King of Hanover*, (6 Beav. 1); *The Skinners Company* v. *The Irish Society*, (7 Beav. 593); *Burney* v. *McDonald*, (15 Sim. 16.)]

Vice Chancellor Knight Bruce's Court.

Briggs v. *Penney*. Aug. 6, 1849. *Will — Construction — Residuary Legatee — Trustee — Gift to Executor — Precatory trust — Words — "Well knowing" —"Views and wishes"— Wills act — Mortmain act.* A testatrix made her will in 1835, by which she bequeathed various charitable and other legacies, and gave to S. P. £3000, and a like sum of £3000 in addition, for the trouble she would have in acting as executrix. She then gave further charitable and other legacies and special bequests, and then gave all the residue of her personal estate to said S. P., her executors, administrators, and assigns, "*well knowing that she will make a good use, and dispose of it in a manner in accordance with my views and wishes.*" Four papers were found in the testatrix's handwriting, unsealed, undated, unsigned, and unattested, which were written after the date of the wills act, in which she named various persons, and designated various charitable institutions as objects of her bounty, and gave directions for money being laid out in land for charitable purposes. The will, and a codicil, and one other paper were admitted to proof, but these four papers were not:— *Held*, that S. P. did not take the residue beneficially, but was a trustee for the next of kin of the testatrix; and a reference was directed to the master to inquire and state whether the views and wishes concerning the disposition of the residue which was mentioned in the will of the testatrix, were ever, and if ever, when, declared and made known by her, in and by any instrument, paper, or writing, or instruments, papers, or writings. 13 Jur. 905. [See *Love* v. *Gaze*, (8 Beav. 472); *Andrew* v. *Andrew*, (1 Coll. C. C. 686); *Wood* v. *Cox*, (2 My. & C. 684); *Stubbs* v. *Sargent*, (2 Kee, 255, 3 My. & C. 507); *Hudson* v. *Bryant*,

(1 Coll. C. C. 681); *Corporation of Gloucester* v. *Wood*, (3 Hare, 131); *Witham* v. *Duke of Devonshire*, (1 P. Wms. 529); *Inchiquin* v. *French*, (1 Cox, 1 S. C. Ambler 38); *Taylor* v. *George*, (2 V. & B. 378); *Smith* v. *Attersole*, (1 Russ, 266); *Gibbs* v. *Rumsey*, (2 V. & B. 294); *Morice* v. *Bishop of Durham*, (10 Ves. 522); *Andrew* v. *Andrew*, (1 Col. C. C. 681); *Kersham* v. *Williamson*, (5 Cl. & Fin. 111); *Brughton* v. *Knight*, (11 Cl. & Fin. 529); *Bardswell* v. *Bardswell*, (9 Sim. 319); *Goods of Dyer*, (1 Hagg. 219); 1 Williams on Executors 63, 91, (4th ed.); *Chapman's case*, (Dy. 333); *Camden* v. *Cluke*, (Hob. 33); *Crossley* v. *Clare*, (Amb. 397); *Addlington* v. *Cam*, (3 Atk. 141): *Bland* v. *Bland*, (2 Cox, 349); *Wynne* v. *Hawkins*, (1 Bro. C. C. 179); *Harland* v. *Prigg*, (Ib. 142); *Pierson* v. *Garnett*, (2 Bro. C. C. 38, 225); *Sprague* v. *Barnard*. (Ib. 586); *Earl of Stamford* v. *Hobart*, (3 P. P. C. 38); *Attorney General* v. *Hall*, (1 Ves. Sen. 9); *Maline* v. *Keighley*, (2 Ves. Jr. 335, 529); *Miggison* v. *Moore*, (Id. 632); *Pushman* v. *Filliter*, (3 Ves. 7); *Brown* v. *Higgs*, (4 Ves. 708); *Strickland* v. *Aldridge*, (9 Ves. 576); *Wilson* v. *Major*, (11 Ves. 205); *Parsons* v. *Baker*, (18 Ves. 478); *Tebbets* v. *Tebbets*, (19 Ves. 664); *Cary* v. *Cary*, (2 Sch. & L. 189); *James* v. *Allen*, (2 Mer. 17); *Henry* v. *Hancock*, (4 Dow, 145); *Prevost* v. *Clarke*, (2 Madd. 118); *Curtis* v. *Rippon*, (Id. 434); *Woolmore* v. *Burrows*, (1 Sim. 512); *Sale* v. *Moore*, (Id. 534); *Meredith* v. *Heneage*, (Id. 542, S. C. 10 Sim. 230); *Mortimer* v. *Kent*, (2 Sim. 282); *Podmore* v. *Gunning*, (5 Sim. 485); *Wright* v. *Atkins*, (1 T. & R. 157); *Ommancy* v. *Butcher*, (Id. 270); *Fowler* v. *Garlike*, (1 Russ & My. 232); *Luckner* v. *Lane*, (2 My. & K. 197); *Ellis* v. *Selby*, (1 My. & C. 286); *Earl of Dorchester* v. *Earl of Effingham*, (3 Beav. 180); *Ford* v. *Fowler*, (Id. 146); *Finden* v. *Stephens*, (2 Phill. 142); *Knott* v. *Cutler*, (Id. 192); *Ex parte Parne*, (2 You. & C. 636); *Show* v. *Lowless*, (5 Cl. & Fin. 111, 129); *Phillips* v. *Eastwood*, (L. &. G. 297); *Langham* v. *Sandford*, (19 Ves. 641.)

Vice Chancellor Wigram's Court.

Lucas v. *James*, April 18, 1849. *Agreement — Vendor and Purchaser — Agency — Pencil Memorandum and Signature — Nuisance — Specific performance.* The defendant, being in treaty for a family residence with a house agent, who had been employed by the plaintiff, wrote in pencil his signature to the agreement for an under lease, tendered to him by such agent, and also, *in pencil*, the following words: — "I have no objection to this agreement, supposing that there is nothing unusual in Sir R. S.'s leases, which I presume there is not. W. M. J." And also, "I agree to these terms, subject to the above observations. W. M. James." At the time of this transaction, there existed a public nuisance in the immediate neighberhood of the house in question, which rendered it objectionable as a family residence. The fact of such nuisance did not appear to have been known at the time to the plaintiff, although, upon inquiry, it might have been ascertained. Nor was it at all known to the defendant until shortly afterwards, when the latter abandoned the alleged contract. The court,

upon a bill filed for the specific performance of the agreement, refused to enforce it, upon the ground that the memoranda in pencil, written by the defendant, had not been ratified by the plaintiff as the principal, and that the transaction did not, in law, without such ratification by the principal, constitute a binding agreement between the parties. *Semble*, that the circumstance of the memoranda being written in pencil did not vary the rights of the parties, or exclude the presumption that they were written *animo deliberando*. 13 Jur. 912. [See 29 Car. 2, c. 3; *Shirley* v. *Davies*, (cit. in 6 Ves. 678, and ref. to in 1 Sugd. Vend. 538, 10 ed.); *Huddleston* v. *Briscoe*, (11 Ves. 583); *Church* v. *Brown*, (15 Ves. 258); *Deverell* v. *Lord Bolton*, (18 Ves. 514); *Stratford* v. *Bosworth*, (2 V. & B. 341); *Fyldes* v. *Hooker*, (2 Mer. 430); *Ogilvie* v. *Foljambe*, (3 Mer. 53); *Kennedy* v. *Lee*, (Id. 441); *Holland* v. *Eyre*, (2 S. & S. 194); *Duncroft* v. *Albrecht*, (12 Sim. 189); *Doe* v. *Parkes*, (3 B. & A. 489); *Winsor* v. *Pente*, (5 Mor. C. P. 484); *Early* v. *Garrett*, (9 B. & C. 928); *Cornfoot* v. *Fowke*, (6 M. & W. 368); *Fuller* v. *Wilson*, (6 Jur. 799); *Taylor* v. *Ashton*, (11 Mees. & W. 401); *Gibson* v. *D'Este*, (2 S. & C. N. S. 542); *Wild* v. *Gibson*, (12 Jur. 527); *Smith* v. *Marrabbs*, (11 Mees. & W. 5); Upon the effect of pencil writing see *Hawkes* v. *Hawkes*, (1 Hagg. 321); *Edward* v. *Astley*, (Id. 490); *Karnscroft* v. *Hunter*, (2 Hagg. 68); *Rymes* v. *Clarkson*, (1 Phill. 22); *Parker* v. *Bainbridge*, (3 Id. 321); *Francis* v. *Grover*, (5 Hare, 39).]

Winthrop v. *Murray*, August 4, 1849. — *Withdrawal of Co-plaintiff.* One of several co-plaintiffs concurred in the prosecution of a suit up to a particular period, and then instructed the solicitor of the plaintiffs not to take any further proceedings in the cause. On proceedings being, nevertheless, taken, the dissentient co-plaintiff moved that the solicitor for the plaintiffs might be ordered to indemnify him in respect of subsequent costs of the suit. 13 Jur. 955. [The Court relied on *Holkirk* v. *Holkirk*, (4 Madd. 51); in opposition to *Langdale* v. *Langdale*, (13 Ves. 67).]

Sentance v. *Porter*, July 14, 1849. *Practice — Costs of unnecessary Litigation.* In a suit for the delivery up of deeds in the defendant's possession, and upon which he claimed a lien, it was referred to the master to ascertain the amount of the defendant's lien. The master stated to the parties the amount which he intended to report; whereupon the plaintiff offered to pay that sum to the defendant together with his costs of suit up to that time. The defendant refused the offer, but did not except to the report afterwards made by the master in accordance with his statement: — *Held*, on *motion* at the hearing on further directions, that the defendant ought to have accepted the plaintiff's offer, that the litigation subsequent thereto was useless; and that each party should pay his own costs subsequent to the report, including those of the motion. 13 Jur. 980.

Court of Queen's Bench. Sittings in Banco after Trinity Term.

Darch v. *Toser*, July 5, 1849. *Debt for Timber sold and delivered.* Plaintiff proved that the timber was supplied by him, upon the order of

the defendant, for finishing certain houses; and the defence was, that the houses belonged to F., and that plaintiff had contracted with defendant as agent of F. *Held*, that plaintiff could not give, in reply, evidence of declarations by defendant that the houses were his, because such evidence went to the very point in question between the parties. The admission of evidence, which turns out to be irrelevant, affords no ground for a new trial, where the judge has told the jury that it had no bearing upon the case. 13 Jurist, 959.

Court of Common Pleas. Sittings in Banco after Trinity Term.

Wild v. *Harris*, June 12, 1849. *Promise of Marriage — Consideration.* A promise by A. to remain single, and to marry B. within a reasonble time, is a good consideration for a promise by B. to marry A. within a reasonable time, although B. at the time of the promise (but unknown to A.) is married to another person, then living. 13 Jur. 961.

Easter Term.

Richards v. *The London and South-coast Railway Co.*, May 7, 1849. *Carrier — Railway — Duty to Deliver — Negligence.* The declaration stated that the defendants were common carriers for hire on a railway from W. to S.: that the plaintiff's wife was received by the defendants as a passenger, with her dressing case and other luggage, to be conveyed from W. to S., and there safely delivered to the plaintiff, for reasonable reward. Breach, that the defendants did not use due care in the conveyance, but that, by their carelessness, negligence, and improper conduct, the dressing case was lost. The evidence was, that the plaintiff's wife was received at W. as a passenger to S., and the dressing case was placed in the same carriage with herself; that, on arriving at S., she, being in a weak state of health, was carried to a hackney-coach, and her luggage was removed thither by the defendants' servants, and the dressing case was never seen after leaving the railway carriage: — *Held*, that the evidence supported the declaration, that the duty of the defendants to deliver was charged, and they had not delivered: — *Held*, *also*, that it was not necessary to prove negligence, although it was charged. 13 Jur. 986.

Court of Exchequer. Trinity Term.

Koosey v. *Purday*, June 5, 1849. *Copyright — Foreigner.* A foreign author residing abroad, or his assigns, is not an author within the meaning,

and cannot have the benefit, of the statutes 8 Ann. c. 19, and 54 Geo. 3, c. 156, as these acts were intended for the encouragement of British talent and industry by giving to *authors* who are British subjects either by birth or residence, or their assigns, a monopoly in their literary works, dating from the period of their first publication here. But supposing a foreign author and his assigns to be within these acts, and to have by law a copyright, where the author means to publish simultaneously in England and abroad, he or his assigns are not disentitled to copyright by the actual publication in one place before the other on the same day. 13 Jur. 918.

Michaelmas Term.

Luck v. *Handley*, Nov. 12, 1849. *Bill of Particulars.* In an action for making a false representation of the circumstances of a third party, in consequence of which the plaintiff was induced to supply him with goods on credit, the defendant is not entitled to be furnished with the particulars of moneys paid by the debtor to the plaintiff in respect of those goods. 13 Jur. 963.

Court of Admiralty.

La Purissima Concepcion. W. B., having acted as an agent for rendering services to a foreign ship in distress on the English coast, afterwards entered an action against the ship, &c. as a salvor. The court held, that he was entitled to sue in that character, but referred all the accounts between him and the owners to the registrar and merchants, before decreeing any sum as salvage. 13 Jur. 967.

Notices of New Books.

A Treatise on the Principles of Pleading in Civil Actions. By James Gould, LL. D. Third Edition, carefully compared with the Second Edition, (revised and corrected by the Author.) And published, under the direction of George Gould. Burlington: Chauncey Goodrich. 1849.

This is a new edition, or more properly a reprint, *verbatim*, of the second edition of Judge Gould's Pleading, being the substance of his lectures at the Litchfield Law School, without note or comment. The reason for this unusual course, unusual certainly in our days, as stated by Mr. George Gould, in the advertisement to this edition is very well, provided the book is already as nearly complete and perfect as it could be ex-

pected to be made, or if indeed, which is perhaps more probable, the art of pleading is soon to be reckoned among the lost arts, which is the substance of Mr. Gould's advertisement. But in an elementary work, however perfect, upon any department of the study of the law, which is still regarded as progressive, the omission of notes, referring to later decisions upon the subject, so that the work shall present to the reader, at the time of publication, the present state of the laws, must certainly be regarded as a very essential defect. We have struggled hard to convince ourselves, (as the surest mode of convincing others,) that special pleading was an important instrument, both in the study and the administration of the common law. But we are compelled to admit, that, in this country certainly, the indications of public sentiment, and the progress of affairs in state legislation, and in the procedure of civil trials in court, are altogether in a contrary direction; and in short, to adopt the language of one of the early christian fathers, as to what might justly be regarded, as christian doctrine, it is now regarded as a settled doctrine of municipal law, in the American courts, *semper et ubique et ab omnibus*, that the forms and technicalities of special pleading, are to be cast away, and a man is to enter the lists of a court of justice, as he would the arena of the battle field, trusting more to the truth and justice of his cause, than to the proof of his armor, or in his own dexterity in wielding it.

This is all very plausible no doubt, and strikes the common mind as wholly unanswerable, and for that reason it is in vain to attempt to withstand the sweeping torrent, which has already borne down, and utterly carried away into the abyss of things lost upon earth, the entire fabric of the forms of judicial administration, in the most populous, the most wealthy, the most commercial, and what was at one time esteemed the most conservative state in our great confederacy. We shall therefore speak a few words in discussing a question; which — whatever may be thought of its practical bearings upon the administration of private or public justice — is now irrevocably answered, in a manner to leave no just ground of doubt in the minds of all sober persons. What will be the final result of this effort at simplification, in the procedure of courts, it is perhaps, impossible at present fully to know. To those who spend their lives chiefly in halls of justice, some of the more obvious results and superficial indications of this system, must have already become familiar. We have already the beginning of the end, in the very great relaxation of study, and severe and systematic knowledge of the principles of the profession among the great mass of those who were once said to be "called to the bar," and who now enter it *per saltum*. It has a tendency too to annihilate all distinctions almost, even those of time and space, and to make every *barrister* more or less a *bore*, and to render all *terms* of court absolutely *interminable*. The difference in this respect is sufficiently indicated in a late article, published in this Journal, (by Mr. Hillard,) giving some account of the English practice, contrasting so favorably with our own, in regard to prolixity and endless circumgyration in the conduct of trials.

But there are no doubt many important advantages, which will ulti-

mately follow in the long train of consequences, which, in time, may be expected to flow from so important and radical a change. We shall have the law made easy! and every man his own lawyer, and justice brought to every man's door, and the beautiful simplicity and plainness of forensic debate puffed into the bloated fustian of stump oratory! But it is an ill wind that blows no body any good, and doubtless, even this revolution will ere long be seen to be but a link in the vast chain of human progress, whose march is ever onward and upward! At all events, the change has come, and the profession must prepare to stand out of the way, or fall before it, and die like men.

But presuming, that in many of the states, to a considerable extent, and for many years perhaps, the forms of special pleadings, in civil actions, will be retained, we take pleasure in recommending this edition of Judge Gould's treatise upon that subject to the favorable notice of the profession. The book is already well known to the profession, and justly esteemed for its simplicity and clearness of language, directness of aim, and philosophical precision, in the analysis and arrangement of the entire subject. It is perhaps the best book extant upon that subject to put into the hands of students. We have not been accustomed to regard this work, as embracing so fully the entire body of the law upon this subject, as the treatise of Mr. Chitty, which is indeed a library, in itself, and has done more to make good lawyers, in the last twenty years, than any other book perhaps. But Mr. Chitty's work is intended for the practitioner, as well as for the student, and is as important the last hour of the service of the most eminent special pleader, as at the very outset of the veriest tyro. We suppose too, that Mr. Stephens's work, as a mere composition, as a masterly analysis and combination of the principles of special pleading, is perhaps superior to all others.

But we believe that Judge Gould's long familiarity with the practice of the courts, in Connecticut, and above all, his annual course of lectures to the students at the Litchfield Law School, enabled him to present the subject in such a form, as to make it more intelligible to the mind of mere beginners, and less repulsive than any other book upon that subject, which we have known. We have been accustomed, for many years, to recommend all students in the law, over whom we have had any charge, to purchase Gould's Pleading, as a constant manual.

But the book had gone nearly out of print, and by consequence was held at an exorbitant price by the booksellers, and we are glad that Mr. Goodrich has printed a new edition, and have no doubt he will find a ready sale. The book is in the usual style of law books, upon fair paper and good type, firmly bound in good law-sheep. We should have been gratified to find a thorough and systematic digest and analysis of all the later decisions bearing upon the subject. But that would have been a work of considerable labor, and for which most persons, possessing the requisite qualifications, cannot command sufficient leisure.[1]

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[1] The above notice was written by a gentleman of eminent reputation, who has often contributed to this Magazine. Although it is well known that we do not enter-

CASES IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE THIRD CIRCUIT, WITH AN APPENDIX. Reported by JOHN WILLIAM WALLACE. Philadelphia: Walker, 24 Arch street, 1849.

This volume of reports, which (to distinguish it from a pamphlet volume published about fifty years ago, by the late J. B. Wallace, and generally cited as Wallace's Reports) is styled Wallace, jr.'s, reports, will constitute a valuable addition to any lawyer's library. The reporter informs us that he undertook his task, nearly eight years ago, at the suggestion of the late Mr. Justice Baldwin, supposing that in a short time a sufficient number of cases would be decided to complete a volume. But the judge's illness and death, and the subsequent interruption of the business of the circuit by the long continued vacancy, for a time frustrated his plan. It is, therefore, only at this late period that he has been enabled to present his volume to the profession.

We wish we had room to call attention to several of the cases reported. The first is the well known case of the *United States* v. *Holmes*, in which the conduct of the seamen on the occasion of the shipwreck of the William Brown, was inquired into. We would also notice the case of *The Royal Saxon*, a case somewhat like that of *The Taranto*, decided in this circuit by Mr. Justice Sprague, and in which Mr. Justice Grier inclined to a similar opinion as to the jurisdiction of the court, although the authority of *DeLovio* v. *Boit*, (7 Gall. 398,) and *Certain Logs of Mahogany* (2 Sumner, 589,) is doubted. In *The Superb*, a pretty nice question in the law of general average is considered. In *Stimpson v. The Railroads*, it was held that a jury in a patent case cannot allow the plaintiff his counsel fees as part of his actual damages. In *The S. G. Owens*, there is a decision of some importance touching the ownership of vessels. In an *Anonymous* case (p. 107,) the court, in order to receive a valuable opinion by Hon. Horace Binney, held that the opinion of counsel, not in practice, and in cases other than that at bar, might be quoted by consent of the court. The volume closes with the award of Mr. Sergeant in the *Pea Patch* case, the subject matter of which our readers are familiar with.

In parting with this volume, we must be permitted to express our admiration of the elegant typographical execution of the work. It is also a work which does great credit to the reporter. The cases are very carefully prepared, and the arguments of counsel are generally inserted at length. The *marginal abstracts* are of great convenience to any one who is obliged to refer to a case in a hurry.

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tain the same dread of reform in practice, which appears in his article, yet his views are so pleasantly expressed that we take pleasure in giving them the benefit of our circulation. We are glad, moreover, to aid in noticing the appearance of a new edition of an elementary treatise, of which even the most ardent friends of reform acknowledge the value It may be unnecessary, perhaps, to add that we have no objection to the utmost strictness and exactness in practice. The proposed simplifications certainly would not be attended with an unfavorable result in this respect in Massachusetts.

MEMOIRS OF THE LIFE OF WILLIAM WIRT, ATTORNEY-GENERAL OF THE UNITED STATES. By JOHN P. KENNEDY, a new and revised edition. In two volumes. Vol. I. Philadelphia: Lea & Blanchard.

The name of William Wirt is held in deserved esteem throughout our whole country. It will give us pleasure, in a future number, to recur to this work, and to give some extracts relative to the more interesting portions of his life.

REPORTS OF CASES DETERMINED IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MAINE, with some Opinions of the District Judge in cases determined in the Circuit Court 1839–1849. By EDWARD H. DAVEIS: Portland. Printed by Thurston & Co. 1849.

Upon our first receipt of Mr. Daveis's Reports, we were satisfied that it was eminently worthy of careful study. That study we have thus far been unable to give to it. In our next number, we shall examine it more critically. Meanwhile, we are gratified to say that the work is prepared in a manner worthy of the able decisions which the reporter has had the privilege of collecting.

REPORTS OF CASES ARGUED AND DETERMINED IN THE COURT OF CHANCERY OF THE STATE OF NEW YORK before the HON. LEWIS H. SANDFORD, late Vice Chancellor of the first circuit, Vol. IV. New York: Banks, Gould & Co., 144 Nassau Street, Albany: Gould, Banks & Gould, 104 State Street. 1850.

We received the above named volume of Sandford's Reports, just as we were going to press. It would have given us pleasure to have bestowed a more elaborate notice upon it. At present, we can only add that it is entitled to as much commendation as has been bestowed upon the preceding volumes of the same series.

Miscellaneous Intelligence.

MR. CHARLES PHILLIPS'S DEFENCE OF COURVOISIER.

WE published in our last number, a letter by Mr. Charles Phillips to Mr. Samuel Warren, which appeared in the London Times of November 20, 1849. This letter seemed to us at the time, to be a complete defence of Mr. Charles Phillips against charges which had been continued for more than nine years, and which had produced a decided impression upon the public mind. For the honor of the profession, we were glad to lend our humble aid to correct what appeared to be, as we stated, "*a stale calumny.*" But we regret to say that subsequent articles in the London Examiner have in a great measure, destroyed the effect of Mr. Phillips's

communication. In common justice, we feel bound to republish these articles, so that our readers may judge for themselves in regard to Mr. Phillips's course. Our limits will preclude the publication in this number of all that we should wish to present, but we shall recur to the matter again.

In the mean time we must be excused for saying that the impression which was made upon us by Mr. Phillips's letter, was not unlike that which was made upon all the journals of jurisprudence in England. We have already quoted from the London Legal Observer.

The Jurist of November 24, speaks as follows: —

"In the 4th volume of THE JURIST, (p. 593,) we discussed a question which, at that day, excited great attention, not only among the members of the profession, but at every table where educated men met. We allude to the question, whether Mr. Charles Phillips, then simple counsellor at law, since and now holding judicial office, had or not greatly exceeded the privilege of the bar in his defence of a person accused of murder. We did not in the paper referred to, actually name Mr. Phillips; but we took as admitted facts, in reference to which a principle was to be discussed, facts which all the world connected with the conduct of the Courvoisier defence: and we therefore, *pro tanto*, indirectly injured Mr. Phillips, if he was innocent of the conduct attributed to him.

"Mr. Phillips has recently published a letter explaining all the circumstances, respecting which confused accounts, or other causes of error, had at the time misled the public. We are bound to say, that, after reading the letter of the learned commissioner, no doubt whatever remains on *our* mind that his conduct was misrepresented, and that, in most painful and trying circumstances, he did exactly what a right-minded man and a conscientious advocate ought to have done. Whether this amende, late only because the explanation which has called it forth has been late, will administer, in any the slightest degree, balm to the wounded feelings of a man conscious of having been calumniated, we cannot, of course, form an opinion; we hope that it will. At any rate we have unintentionally joined in a wrong; it is therefore our duty, as public writers, to retract, so soon as we have proof that we were wrong; and we have no slight gratification in finding, that, in acquiescing in the belief that a member of our profession had been guilty of cruel and unconscientious conduct, we were wholly mistaken.

"Mr. Commissioner Phillips's letter lays down the rule that is to govern the conduct of counsel in the defence of his client exactly as we have always conceived it. It is quite clear, that nothing can justify counsel in doing what is called, throwing up a brief, except that species of conduct in the client which amounts to a fraud upon his counsel, and would drag that counsel into a dishonorable position; or else the discovery that the client's case is utterly hopeless. But for a client, if he be a person charged with crime, to avow his criminality, or for a party to a civil proceeding to avow that he has no moral claim, is no ground for his counsel, who has accepted his brief, to throw it up.

"It must not be forgotten, in this sort of inquiry, that counsel are not priests. It is not their duty to rebuke men for their moral iniquities, or to see that they are dealt with according to their moral merits or demerits. In judicial proceedings, the rights of suitors are dealt with according to the law of the country, and by their compliance with, or departure from the rules of that law are they to be judged. It may be, that, by applying the law a criminal escapes punishment, or a just man meets injury.

If such things happen, it is the fault of the law, the consequence of the imperfection of human institutions; but, since men's civil rights are the creatures of the municipal law, it is the duty of the advocate simply to see that his client obtains those rights to which by law he is entitled; and if by the rules of the law, a man actually guilty in a moral point of view, is not legally guilty, it would be as gross an act of injustice in his counsel to abandon him, as it would be in his judges to condemn him.

"For since it is by the laws of his country, and not by the law of God, that he is being judged, he has a right to have proper care taken that he is only found guilty according to those laws, by the standard of which he is judged. And it must be observed, that what we are here advocating is not, as the public sometimes view it, the encouragement of moral wrong, under cover of technical legal right, but merely the enforcing of those laws which represent the average morality of the community. If a thoroughly sound and high toned moral principle governed the actions of all men, there would, of course, be no necessity for laws; but because each man's notions of right and wrong are considerably different from his neighbor's—because, in fact, there is no standard of high morality so recognized and earnestly believed in, as practically to regulate the conduct of men —therefore it is that laws are made. And as it passes human wisdom to make laws capable of embracing all possible cases, while the very object of having any laws at all is, that men may know what, in the absence of any internal standard by which to regulate their conduct, they may or may not do, it follows that the general cause of morality is better served by maintaining a general adherence to the fixed standard of morality settled by the municipal laws, than by each man endeavoring to set up his own particular view, the rectitude of which would be questioned by every one of his neighbors. And hence, also, it follows, that the counsel who confines himself to the establishment of his client's legal rights, without reference to the question, whether, in the particular case, those rights are also, in the opinion of the counsel, or of any considerable number of men, moral rights, is doing more to uphold the general morality of the community, while thus supporting a fixed rule, than he would by following his own opinion, even if that opinion were shared by most of those considered good men, and thus introducing uncertainty. In truth, laws are made for the very purpose of setting up some settled rule — not a perfect one, but as good a one as the average morality and intelligence of the country can frame; and the judge who should judge by any standard but those laws, or the advocate who should look to any other standard in the struggle for his client's rights, would be contending against the very certainty which it is the object of all legislation to provide with a view to the well-being and practical morality of the people. We say, therefore, that, on every ground, the practice of the bar of defending a client, to the extent of seeing that he is only condemned *according to law*, is not only defensible, but highly beneficial to the community. Of course, counsel, in doing so, is not called upon to do or say any thing compromising his own personal honor or integrity; he is not called upon to make any personal assertion of belief contrary to his real belief. But take the very case which has elicited these observations, where the counsel is apprised that his client is actually guilty; yet, if the law has laid down, for the general protection, some certain rules of evidence, or otherwise, according to which only, the legal conclusion of a man's guilt is to be arrived at, it is the duty of counsel to do as Mr. Phillips did — to retain his brief, and to use every endeavor that his intellect could suggest, to take care that his client shall not be condemned, except by a conclusion strictly deducible by applying the fixed rules of the law to the evidence produced.

A subsequent article has appeared upon this subject in the Jurist, which is of a different tenor. We shall publish that in the next number. Meanwhile, let us recur to to the articles in the Examiner.

The article of the 24th November contains a recapitulation of the former charges, and we therefore print it entire: —

Lawyers, Clients, Witnesses, and the Public. It is painful to allude to two cases of recent occurrence, where attempts were made to secure the escape of criminals from conviction, by directing suspicions against the innocent; and in each instance the prisoner had privately confessed his guilt, and the counsel was acquainted with this fact. The subject may be dismissed with the single observation, that the opinion of the bar was in entire accordance with that of the public, in condemning the line of defence adopted. — *Hortensius.* 1849. (An Historical Essay by Wm. Forsyth M. A., Barrister, late Fellow of Trinity College, Cambridge.)

Courvoisier had made a full confession of his guilt the night before this distinguished advocate [Mr. Phillips] addressed the jury for the defence, and the feelings or prejudices of society have received a shock, not at all favorable to the general estimate of the profession, from the fervor which he, notwithstanding, contrived to infuse into his appeal. We took occasion very recently to vindicate the privileges of the bar, and we deem it quite unnecessary to prove again that a counsel is bound to see the due forms of law and the strict rules of evidence observed, whatever opinion he may chance to entertain as an individual of the moral guilt of the party or the actual merits of the case. At the same time we think Mr. Phillips went too far. There was no occasion for insinuations against the maid-servants; nor was it in good taste, to say the least of it, to attempt to work upon the timid consciences of the jurymen, by holding out the apprehension of a never-dying, omnipresent feeling of remorse. — *Law Magazine.* August, 1840.

It is alike improper and unprofessional for counsel to do that for a prisoner which it would be unjustifiable in the prisoner to do for himself; and we apprehend there can be small doubt that it would be unjustifiable in a prisoner to get an innocent man hanged in order to save his own neck from a halter. We have been several years at the bar without once hearing such a course countenanced; and we believe Lord Brougham, Mr. Phillips, and Mr. Seymour must divide between them the enviable distinction of giving it sanction. — *Law Magazine.* February, 1848.

The cases referred to by Mr Forsyth are those of the defence by Mr. Seymour in the Mirfield murders, and the advocacy of Courvoisier by Mr. Charles Phillips. Both have been mentioned, from time to time, in this journal; and Mr. Phillips has been induced to break what he terms "the contemptuous silence with which for nine years" he has treated the charge against himself, by an allusion arising out of the trial of the Mannings. His attempted defence, which will be found in another column *in extenso*, is a striking proof of what we took occasion also to state in remarking on the recent trial, namely, the much greater difficulty of resisting public opinion in this direction at present, than at the time when the outrage was committed by Mr. Phillips. Whether or not the defence proves any thing else, will be seen as we proceed.

The trial of Courvoisier occupied three days — Thursday, Friday, and Saturday, the 18th, 19th, and 20th June, 1840. On Saturday, the 27th, the subjoined comments appeared in the *Examiner*.

MR. PHILLIPS'S DEFENCE OF COURVOISIER.

For the honor or for the dishonor of the profession of the law it should be known whether Mr. Phillips's speech in defence of Courvoisier, after the murdererhad confessed his guilt to him, does or does not exceed the bounds of an advocate's license. It would be unjust to present it as an example of professional morality; the question is, whether it is or is not accordant with professional morality?

To the report of the *Times* a remark is appended in which it is presumed that the confession

Entirely changed the line of defence intended to be taken by his counsel; for it was generally rumored that a severe attack would be made on the fellow servants of the prisoner, and also on the police who were engaged in the investigation.

The intended line of defence (query, lie of defence?) was not changed by the communication in the two points mentioned—the cruelest insinuations were thrown out against the witness Sarah Mancer, and the foulest charges advanced against the police.

Mr. Phillips disclaimed the intention to criminate the female servants. No, forsooth!

God forbid that any breath of his should send tainted into the world persons perhaps depending for their subsistence upon their character. It was not his duty, nor his interest, nor his policy, to do so.

But did he or did he not make the attempt in this passage?—

The prisoner had seen his master retire to his peaceful bed, and was alarmed in the morning by the housemaid, who was up before him, with a cry of robbery, and some dark, mysterious suggestion of murder. "Let us go," said she, "and see where my lord is." He did confess that that expression struck him as extraordinary. If she had said, "Let us go and tell my lord that the house is plundered," that would have been natural; but why should she suspect that any thing had happened to his lordship? *She saw her fellow-servant safe, no taint of blood about the house, and where did she expect to find her master?* Why, in his bed-room, to be sure. *What was there to lead to a suspicion that he was hurt?* Courvoisier was safe, the cook was safe, and *why should she suspect that her master was not safe too?*

Here, too, was a direct attempt to shake the credit of the woman's evidence, and to induce the jury to believe that she had perjured herself—

The depositions taken before the coroner were now before the learned judges, and perhaps they would consider it their bounden duty to tell the jury whether that woman swore before the coroner as she did before the court. His conscience was clear; he had discharged his duty by throwing out that suggestion. The question he had put to the witness was this:—"Upon the oath you have taken, did you not tell the coroner that you saw — instead of some blood on the pillow — his lordship murdered on the bed?" That was matter for the jury to consider; he would now pass on.

If the coroner's inquest, which the *Globe* pronounced so eminently well conducted, had done its duty, the discrepancy between Sarah Mancer's evidence and that of the other persons who saw the napkin over the face of the murdered nobleman would have been cleared up. The discrepancy was evidently nothing more than an inaccuracy of expression; but the effect of leaving it unexplained was, as we have seen, to expose the principal witness to a charge of falsehood.

Then, as to the police, does it appear that Mr. Phillips's line of defence was altered in these attacks, the groundlessness of which he knew as well as his client's guilt? The witness Pearce is thus dealt with:—

"Look here, sir," said he to Courvoisier, "dare you look me in the face?" Merciful God! was there any exhibition on earth so likely to strike him dumb with horror as the proofs of the murder lying before him, and that miscreant challenging him to look him in the face? He did look him in the face, and answered him, "I see them, I know nothing about them; my conscience is clear, I am innocent." The learned counsel animadverted in very strong terms upon the testimony of this witness, charging him with an attempt to intimidate the prisoner, and thereby to extort from him a confession of the murder. He also condemned the conduct of Mr. Mayne and Mr. Hobler in permitting Pearce to hold that interview with the prisoner. Such treatment was worthy only of the Inquisition. Yet the fellow who did all this told the jury he expected to share in the plunder — the £450 reward — *which was to be divided over the coffin of Courvoisier!* He had hoped the days for blood money were past.

Mr. Phillips, when he uttered this tirade, knew that Pearce was right in fact, though not perhaps in form — that he had confronted the murderer, and dared him to deny his guilt; but Pearce is "the miscreant," and Courvoisier the injured innocent.

The attack upon Baldwin is still more unjustifiable, and it is accompanied with a general charge of conspiracy against the prisoner, of whose guilt the speaker was cognizant.

Next came Baldwin, who had done his best *in the work of conspiracy* to earn the wages of blood. He swore well and to the purpose — he did all he could to send a fellow-creature "unhouseled, unanointed, unaneled" before his God. That man equivocated and shuffled, and lied on his oath as long as he could, pretending never to have heard of the reward because he was no scholar, although every wall in London was blazoned with it.

Next the character of Mrs. Piolaine was to be defamed, in order to procure the acquittal of the murderer.

He (Mr. Phillips) hoped the jury knew something of Leicester place. If they did, they knew the character of this hotel, with a billiard-room attached to it, where, unlike at a respectable hotel, any stranger, not being a guest, might enter and gamble.

All these imputations, of different degrees of blackness, were flung out by Mr. Phillips, in the hope of obtaining, by them, the acquittal of a man whom he knew to be a murderer of the blackest dye.

A correspondent of the *Times* states —

Mr. C. Phillips, who defended the wretched man Courvoisier on Saturday, complained in court of a very gross and false statement which appeared in a notorious Sunday paper, and which, he said, might injure him in the estimation of his brethren at the bar, as well as the public at large, if it were left uncontradicted. The effect of the statement was, that he had made a solemn appeal to God of Courvoisier's innocence. So far from having done so, the learned gentleman said he cautiously abstained from adopting such a course, and for the best reason — that the miserable man had previously admitted his guilt to him, and after he had heard the confession he was about to throw up his brief, until his friend, Mr. Clarkson, persuaded him not to do so. He acted upon that advice, and did the best he could for the guilty wretch, although against his own feelings and conviction. Mr. Phillips added, that he had spoken to both

the learned judges upon the subject, and they assured him that they had purposely watched his speech, and felt quite convinced that he never attempted to use the language attributed to him. Many others in court gave similar testimony.

In the *Times'* report we find this emphatic assertion: "*The omniscient God alone knew who did this crime.*"

This was said by the man who himself knew who did the crime, and who profaned the name of the Deity by thrusting it into a solemn assertion, of the untruth of which he was cognizant.

We pass to a less grave example of the lengths to which this advocate carried his zeal for a murderer.

The slightest expressions had been fastened upon — "I wish I had old Billy's money, I would not be long in this country," was construed into a proof that he had meditated murder. Yet it was not an unnatural wish for a foreigner to express, toiling for his daily sustenance, yet longing to revisit his father land, rugged though it be — "I wish I had the wealth of such an one, I would not be long away from my own country!" Ambition's vision, glory's bauble, wealth's reality, were all nothing as compared to his native land. Not all the enchantments of creation, not all the splendor of scenery, not all that gratification of any kind could produce, could make the Swiss forget his native land:—

> Dear is that shed to which his soul conforms,
> And dear that hill that lifts him to the storms;
> And, as a child, by jarring sounds oppressed,
> Clings close and closer to its mother's breast,
> So the loud torrent and the whirlwind's roar
> But bind him to his native mountains more.

There never dropped from human lips *a more innocent or natural expression*, "I wish I had old Billy's money, I would soon be in my own country."

And this maudlin stuff was uttered by the man in whose ears the murderer's confession of his guilt was yet ringing; Mr. Phillips, while harping on those words, being conscious that his blood-stained client had coveted the money, and cut his master's throat to obtain it.

Whether all this accords or not with professional morality it is not for us to decide; but, if it does, the public will probably be disposed to think that the profession should change its name from the profession of the law to the profession of the lie.

We should like to know the breadth of the distinction between an accomplice after the fact, and an advocate who makes the most unscrupulous endeavors to procure the acquittal of a man whom he knows to be an assassin.

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The subject attracted very considerable attention, and the general feeling manifested against Mr. Phillips elicited attempts to defend him on the part of his friends. Referring to these a fortnight after the foregoing article appeared, and to a statement which had been circulated as to the defence originally proposed, the *Examiner* of the 11th July had the following remarks:

We observe the following startling statement in the *Globe:*

"COURVOISIER'S INTENDED DEFENCE. — While the preliminaries for the approaching execution were in progress, and a large number of gentlemen were assembled in a room adjoining the prison, waiting for admis-

sion, it was stated by one of the city authorities, as an admitted fact, that the line of defence which Mr. Phillips, the criminal's counsel on his trial, intended to have taken was, *That the female servants had been engaged in criminal intrigue with some of the police, and had admitted them into the house for the purpose; that the robbery and murder had been perpetrated by them.* The secretion of the jewelry and other articles in the butler's pantry was to have been thus accounted for: and the subsequent discovery of blood-stained gloves, &c., so strangely rolled up in Courvoisier's linen, after the real perpetrator of the deed was in custody, and had left the house, was to have been adduced as further presumptive proof of the police being the guilty parties, for the purpose of criminating the prisoner."

According to this story, then, Mr. Phillips's intended line of defence would have been directed not only against the characters but against the lives of the innocent female servants. They were to have been murdered — for sentence of death upon false accusation is nothing less than murder on the part of those raising the false charge — to procure the acquittal of the miscreant. It is to be observed that Mr. Phillips could have had no grounds for believing that the maid-servants and the police had committed the murder; but the statement that such a defence was meditated is too horrible to be credited, and the circulation of it is an affront to public morality.

Quite bad enough was Mr. Phillips's defence as it was, yet, though condemned by the right sense of the public, it has had its advocates. In the most ingenious argument we have seen in vindication of it, the counsel is said to represent the prisoner with the advantage of the knowledge of the law and skill in sifting evidence, and giving due significance to facts; and it is therefore contended that it is the counsel's duty to act for the prisoner as the prisoner would act for himself if he had his advocate's skill. Admitting this position, it does not thence follow that it is the duty of the advocate to have recourse to falsehood in defence of his client; for the principle stated would only clothe the advocate with the rights and duties of the prisoner, and it cannot be the duty of the prisoner to lie for his own defence. Society cannot prevent his lying; the law must allow of his lying, it must yield him the opportunity of lying, if he chooses to lie; but the impossibility of preventing the lie and the opportunity of the lie do not render the lie a right or a duty. How then can it be contended that the advocate, knowing his client's guilt and the circumstances of it, has a duty to uphold falsehood which does not belong to his client?

We admit that there are grave objections to throwing up a brief. Cases not probable, but possible, may be imagined, in which a destroying weight of prejudice might be thrown upon an innocent client by such a step. A counsel might be moved by ill-will or corruption to ruin a prisoner by throwing up his brief, and thereby implying that he had discovered the guilt of his client. An advocate might therefore feel bound by rule, even after a confession of guilt had been communicated to him, to go through a defence; but in this case we contend that the advocate should scrupulously refrain from any line of defence the effect of which would be to procure the acquittal of his client by criminating or destroying the characters of persons who had but borne true evidence against him. The defence should turn, in such case, on the sufficiency of proof and on technical points, and not on the impugnment of honest evidence, or (worse still) on insinuations of guilt against the witnesses. The truth known to the advocate through the confession gives him the key to other truths, and clears evidence of suspicion which might have attached to it in his view before the knowledge of his client's guilt gave the right reading of circumstances.

Our objections to Mr. Phillips's defence have applied to the points in which he became the assailant or accuser of witnesses whose truth he had no reason to suspect after Courvoisier's confession, and also to his solemn pretences of the murderer's innocence. Had he procured the acquittal of the guilty by this course, and transferred suspicion to the innocent, and placed them on their trial, the morality of his conduct would have been brought to the practical test. To judge of the attempt, imagine the success of it. Had he confined himself to weighing the sufficiency of evidence, and examining flaws in its links, he would at least have avoided wrong and danger to others in the defence of an assassin.

The policy of Mr. Phillips's course we question as much as its morality, for the jurors, having seen, in this example, the extremities to which his zeal for a client of whose guilt he is cognizant will carry him, will in all other instances be apt to suppose that he is pleading against his knowledge of the truths of the case.

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These two articles comprise our charge against Mr. Phillips. It has been re-stated by us from time to time, never with any other feeling than these articles evince. It would have been difficult to overstate any thing so grave. When the fact became known that Sarah Mancer had been lodged in a lunatic asylum, driven mad by the sufferings and terrors arising out of the Courvoisier trial, it was an illustration, not an aggravation, of Mr. Phillips's defence of his client. If we tolerate the one, we cannot make a crime of the other.

We desire attention to a summary of the charge, thus advanced by us, before we proceed to the attempted exculpation.

Having received a private confession that his client was the murderer, Mr. Phillips, disclaiming an intention to criminate the female servants, proceeded to cast upon Sarah Mancer the most foul suspicions. Knowing that the police had fixed the imputation of guilt in the proper quarter, he branded individual members of that body as liars, bloodhounds, and miscreants; and accused them generally of a conspiracy to obtain the government reward by convicting an innocent man. Thoroughly conscious that the evidence of Mrs. Piolaine, if she was believed, would complete the case against the murderer, he threw out the most unfounded aspersions upon her character and that of her husband. Finally, being in possession of the knowledge of who did the crime, he solemnly protested that the OMNISCIENT GOD ALONE KNEW who did it. This was our charge, from which, at the same time, we not only omitted nothing put forward in so-called extenuation, but interfered to throw discredit on a charge yet more incredibly revolting. We carefully quoted Mr. Phillips's God forbid that he should do what he afterwards did. We gave him what benefit might be derivable from his denial of having made a solemn appeal to Heaven of Courvoisier's innocence; from his assertion that he had acted on the advice of others in retaining his brief after the confession; and from the favorable testimony of the judges who tried the case, in regard to his appeal to the Deity. We even admitted his right, in the peculiar circumstances, to retain his brief; and contended only that he should have refrained from any line of defence, the effect of which, if successful, would have procured the acquittal of his guilty client by crim-

inating or destroying the character of persons who had borne true evidence against him. In short, our charge was restricted to Mr. Phillips's solemnly *acted* belief in the murderer's innocence; and to those points in which, in the course of that performance, he became the assailant and accuser of witnesses whose truth he had no reason to suspect after receiving the murderer's confession. Let us now mark how this indictment is met after nine years' rest and reflection.

Mr. Phillips, in his exculpation, alleges our attack to have been threefold, and proceeds to dispose of it under three distinct heads. The first is that of having retained his brief, *which we expressly excepted from our charge.* It now appears that he retained it with the sanction of the judge, Mr. Baron Parke, who assisted Chief Justice Tindal in trying the case, and to whom the fact of the confession was communicated. The second is that of having appealed to Heaven as to his belief in Courvoisier's innocence, *which we gave him at the time the credit of having denied.* As we have said, we did not accuse him of solemnly protesting that belief, but of solemnly acting it. Our assertion was, not that he invented a falsehood to profess faith in his client's innocence, but that he invented a falsehood to profess ignorance of his client's guilt; and that he profaned the name of the Deity by using it to give solemnity to this falsehood. The third and last accusation to which Mr. Phillips replies, is that of having endeavored to cast imputations of guilt upon the female servants; and the sum of his answer on this head is to requote that very "God forbid he should," &c., *which we carefully quoted in our original comment on his speech;* and to declare the charge to have been solely derived from his cross-examination of Sarah Mancer on the day when he still supposed his client innocent, *to which cross-examination we never even remotely adverted.*

Now here we might close this subject, as far as this journal is concerned. Mr. Phillips has only done his best to evade every charge specifically brought against him by us. He does not mention his attack upon the police, whose efficiency and character, so vital to the interests of justice, he labored to damage irretrievably. He does not mention his gross imputations on Mrs. Piolaine, of whom he knew nothing but that she was the decisive witness against his client, and that her identification of him on the evening of the first day of the trial had led to his confession on the following morning. He would evade the profanity of having introduced the name of the Deity into a false assertion, by setting up a difference of assertion hardly material. He would escape the consequence of having imputed guilt to Sarah Mancer, by suggesting a confusion between her cross-examination on Thursday and his speech on Saturday. But this shall not serve. We have been challenged to reöpen this affair, and we will not shrink from doing so. The reply which was meant to dispose of our accusations, will now enable us finally to establish them, on authority above suspicion.

The report of the trial which appeared in the *Times* has been lately restudied by Mr. Phillips; he has in particular "read with care the whole report in the *Times*" of his three hours' speech; and of these reports he guarantees the strictest fidelity. Now we have compared with the *Times*

every passage quoted in the *Examiner* of the 27th June, and find them to have been taken *verbatim et literatim*, from that journal. We now write with the file of the *Times* before us, and with the asssurance of Mr. Phillips himself, therefore, that such additional expressions as we may at present quote are not colored by exaggeration or unfairness. Nor is it less important that we have also the assurance of Mr. Phillips that he knew of his client's guilt before the commencement of the second day's proceedings, a day earlier than has commonly been supposed. Before the court opened on Friday, he heard the confession; he cross-examined all the police constables, except Baldwin, in the course of that day; he cross-examined Mrs. Piolaine in the afternoon of that day; and on the following morning he spoke for the defence. Having premised thus much, we solicit the reader's attention to the subjoined parallel passages.

What Mr. Phillips asserts he did NOT *say.*

I am accused, secondly, of having "appealed to Heaven as to my belief in Courvoisier's innocence," after he had made me acquainted with his guilt! A grievous accusation. But it is false as it is foul, and carries its own refutation on its face. . . . . What! appeal to Heaven for its testimony to a lie, and not expect to be answered by its lightning! What! make such an appeal, conscious that an honorable colleague sat beside me whose valued friendship I must have forever forfeited? But, above all, and beyond all, and too monstrous for belief, would I have dared to have uttered that falsehood in the very presence of the judge to whom, but the day before, I had confided the reality? There, upon the bench above me, sat that time-honored man, that upright magistrate, pure as his ermine, "narrowly watching" every word I said. Had I dared to make an appeal so horrible and so impious, had I dared so to outrage his nature and my own conscience, he would have started from his seat and withered me with a glance. No, Warren, I never made such an appeal; it is a malignant untruth, and, sure I am, had the person who coined it but known what had previously occurred, he never would have uttered from his libel mint so very clumsy and self-proclaiming a counterfeit. — *Times*, Nov. 20, 1849.

What Mr. Phillips admits he DID *say.*

It was not his business to prove who did the crime: that was the task they, (his opponents,) had undertaken. Unless that was proved, he would beseech the jury to be cautious how they *imbrued their hands in this man's blood.* THE OMNISCIENT GOD ALONE KNEW WHO DID THIS CRIME: he was not called on to rend asunder the dark mantle of the night, and throw light upon this deed of darkness. . . . . If they acquitted the prisoner of the murder, he was still answerable for the robbery, if guilty of that. And even supposing him guilty of the murder, which INDEED WAS KNOWN TO ALMIGHTY GOD ALONE, and of which, for the sake of his eternal soul, he hoped he was innocent, it was better far that in the dreadful solitude of exile, &c., &c. . . . . His anxious task was now done; that of the jury was about to begin. *Might God direct their judgment.* — *Times*, June 22, 1840.

What Mr. Phillips dreamt the night before he defended the Murderer.

At the close of the to me most wretched day, on which the confession was made, the prisoner sent me this astounding message, by his solicitor: — "Tell Mr. Phillips, my counsel, that I consider he has my life in his hands." My answer was, that, as he must be present himself, he would have an opportunity of seeing whether I deserted him or not. I was to speak on

What dreams he threatened the jury with if they found the Murderer guilty.

He spoke to them in no spirit of hostile admonition. HEAVEN KNEW HE DID NOT. He spoke to *them in the spirit of a friend and fellow-christian*, and in that spirit he told them that if they pronounced the word [guilty] lightly, *its memory would never die within them. It would accompany them in their walks, it would follow them in their solitary retirements like a shadow,*

the next morning. *But what a night preceded it! Fevered and horror-stricken, I could find no repose. If I slumbered for a moment, the murderer's form arose before me, scaring sleep away, now muttering his awful crime, and now shrieking to me to save his life! I did try to save it.* I did every thing to save it except that which is imputed to me; but that I did not, and I will prove it. — *Times*, Nov. 20, 1849.

Mr. Phillips's definition of the duties of an Advocate.

The counsel for a prisoner has no option. *The moment he accepts his brief, every faculty he possesses becomes his client's property.* It is an implied contract between him and the man who trusts him. *Out of the profession this may be a moot point;* but it was asserted and acted on by two illustrious advocates of our own day, even to the confronting of a king, and, to the regal honor be it spoken, these dauntless men were afterwards promoted to the highest dignities. You will ask me here whether I contend, on this principle, for the right of doing that of which I am accused, namely, casting the guilt upon the innocent? I do no such thing; and I deny the imputation altogether. — *Times*, Nov. 20, 1849.

What Mr. Phillips now says of Courvoisier's fellow-servants.

Thirdly and lastly, I am accused of having endeavored to cast upon the female servants the guilt which I knew was attributable to Courvoisier. You will observe, of course, that the gravamen of this consists in my having done so after the confession. The answer to this is obvious. Courvoisier did not confess till Friday; the cross-examination took place the day before, *and so far, therefore, the accusation is disposed of.* But it may be said I did so in my address to the jury. . . . . I find these words reported in the *Times* — "Mr. Phillips said the prosecutors were bound to prove the guilt of the prisoner, not by inference, by reasoning, by such subtle and refined ingenuity as had been used, but by downright, clear, open, palpable demonstration. How did they seek to do this? What said Mr. Adolphus and his witness, Sarah Mancer? And here he would beg the jury not to suppose for a moment, in the course of the narrative with which he must trouble them, that he meant to cast the crime upon either of the female servants. It was not at all necessary to his case to do so. It was neither his interest, his duty, nor his policy to do so. God forbid that any breath of his should send tainted into the world persons depending for their subsistence on their *it would haunt them in their sleep, and hover round their bed; it would take the shape of an accusing spirit, and* CONFRONT AND CONDEMN THEM BEFORE THE JUDGMENT SEAT OF THEIR GOD. SO LET THEM BEWARE HOW THEY ACTED. — *Times*, June 22, 1840.

Mr. Phillips's Illustration of the duties of an Advocate.

. . . His learned friend demanded, who murdered Lord William Russell? *He*, (Mr. P.,) *was not bound to show that; but he had a right to know who placed the bloody gloves in the prisoner's trunk between the 6th and 14th of May*, when the prisoner had been already three days in gaol? Had there not been practices here? "*Thus bad begins, but worse remains behind.*" This man, it was evidently determined, *should be made the victim of some foul contrivance. . . . . Some villains must have been at work here* to provide proofs of guilt against the prisoner, and endeavor to make the jury instrumental in rendering him *the victim, not of his own guilt, but of their machinations.* — *Times*, June 22, 1840.

What Mr. Phillips said of Courvoisier's fellow-servants nine years ago.

They were bound to show the prisoner's guilt, not by inference, by reasoning, by that subtle and refined ingenuity, *which he was shocked to hear exercised in the opening address of his friend*, [why does Mr. Phillips now omit this?] but by downright, clear, open, palpable demonstration. How did they, &c. And here he would beg, &c. . . . . *He wished not to asperse the female servants.* God forbid, &c., &c. It was not at all necessary to his case to do so. . . . . The prisoner had seen his master retire to his peaceful bed, and was alarmed in the morning by the housemaid, who was up before him, with a cry of robbery, *and some dark, mysterious suggestions of murder.* "Let us go," said she, "and see where my lord is." *He did confess that that expression struck him as extraordinary.* If she had said, "Let us go and tell my lord that the house is plundered," that would have been natural: but why should she suspect that any thing had happened to his lordship? *She saw her fellow-servant safe, no taint of blood about the house, and where did she expect to find her master?* Why, in his bed-room, to be sure. *What was there to lead to a suspicion that he was hurt?* Courvoisier was safe, the cook was safe, and *why should she suspect that*

character." Surely this ought to be sufficient. . . . Can any disclaimer be more complete? And yet, in the face of this, for nine successive years, has this most unscrupulous of slanderers reiterated his charge. Not quite three weeks ago he recurs to it in these terms: — "How much worse was the attempt of Mr. Phillips to throw the suspicion of the murder of Lord William Russell on the innocent female servants, in order to procure the acquittal of his client, Courvoisier, of whose guilt he was cognizant!" *I have read with care the whole report in the* Times *of that three hours' speech, and I do not find a passage to give this charge countenance.* — *Times*, Nov. 20, 1849.

her master was not safe too? — *Times*, June 22, 1840.

It will be observed that Mr. Phillips silently admits, at the opening of the last passage quoted from his exculpation, that he *had* cast aspersions of guilt upon the female servants during cross-examination, and before he had received his client's confession. But let the reader honestly say whether the passages quoted from his speech *after* he knew Courvoisier's guilt were not calculated to strengthen, rather than remove, the effect of previous aspersions. Is not the guilt of a foreknowledge of the murder, if not of the murder itself, distinctly implied? With this impression, embittered by our knowledge of the subsequent fate of this unhappy woman,* we lately worded the charge against Mr. Phillips in such manner as possibly to have conveyed our belief in his *intention* to procure the actual death of the innocent. That he had any such intention, however, at any period, was no assumption of ours. It has been seen how we treated the assertion when it was made by others. What the *effect* of his remarks might have been is a different and more serious question; and this is in no respect qualified by the formal disclaimer on which he now relies for his vindication. To disclaim a reference in the presence of actual and direct insinuations is one of the fouler artifices of rhetoric — nothing more.

Our plain and distinct averment against Mr. Phillips is, that, with a perfect knowledge where the guilt lay, he endeavored to cast the suspicion of the guilt upon the innocent. To that averment we in all respects adhere.

Consider the circumstances in which the insinuations were thrown out. It was not doubted by any one that an old man had been murdered in his sleep; the strongest reasons existed for supposing that the murder had been committed by some one who had opportunities of easy access to the bed-room of the victim; and it was in the nature of things inevitable, that in proportion as the guilt of the deed was thrown off a suspected person who lived or acted in its proximity, it would have the tendency to gravitate to other persons similarly obnoxious to suspicion. Mr. Phillips has favored us with a description of his restless night before he delivered his speech, whereby it would seem, such is the effect of that golden link

* The Exmainer has a note containing a reference to the condition of Sarah Mancer, who is now an inmate of a lunatic asylum.

which is called the *honorarium*, that a conscientious professional man, feed by a murderer and afflicted with nocturnal visions, does not hear the aged and butchered victim crying for justice, but the cowardly and quivering assassin shrieking for impunity. But supposing Mr. Phillips's strenuous efforts to have been rewarded by a verdict, would he have dreamt of the fee he had earned, or of the innocence he had placed in jeopardy?

It is no desire of ours that has again dragged us into these painful details, and we have pursued them with a scrupulous avoidance of exaggeration or overstatement. It is very possible that Mr. Phillips, from the moment he heard the confession, would rather have spared the wrong to the female servants; but the foul work of destroying their credibility and character, which was his only chance of a verdict, had to be persisted in; and it is probable that in his own despite there crept into his speech, in connection with less grave imputations, passages already prepared in accordance with his first day's examination. Mr. Phillips, as we need not say to such as are unhappily familiar with his effusions, or have read the extracts just taken from the speech impugned and the letter which defends it, has but a beggarly oratorical wardrobe. He has little change of dress for a change of occasion. He has had to furbish up a very scanty collection of tawdry rags and ornaments for his various public appearances; and we can easily conceive his inability to meet a sudden demand for inflated and bombastic epithets and sentences, other than were already composed for the day's display. "His poverty and not his will consented." But the plea was not a good one in the mouth of the beggarly wretch who used it to excuse his vending of poison, and it will as little avail Mr. Phillips for the voiding of foul insinuations. The vice of his example has had as pernicious an effect as if it had reflected the utmost vice of intention; and to this we have directed our strictures.

Mr. Baron Parke has deposed, in favor of Mr. Phillips, that he narrowly watched him during the delivery of his speech, and that he had carefully abstained, throughout it, from giving *any personal opinion in the case*. But Mr. Baron Parke must have been somewhat wanting in attention to what passed from Mr. Phillips, if he detected no deliberate falsehood, very strongly involving "personal opinion," in Mr. Phillips's reiterated solemn asseverations that the OMNISCIENT GOD ALONE KNEW who did the crime, and that Courvoisier's guilt, supposing him guilty, was KNOWN TO ALMIGHTY GOD ALONE — the speaker having at the time, as Mr. Baron Parke well knew, a knowledge of the person by whom the murder was committed, Mr. Clarkson also possessing that knowledge, and Mr. Baron Parke himself having been made privy to that knowledge.

Nothing in truth is so easy, in cases of this kind, as to convey all sorts of "personal opinion" without direct commitment of the person. Chief Justice Tindal, being appealed to, confirmed Mr. Baron Parke's statement; but, with all respect for the memory of that distinguished and upright magistrate, we rate his charge to the jury at a higher value than his corroboration of his brother judge. The greater part of Chief Justice Tindal's summing up was directed to the removal of suspicions of an "unjust and depraved conspiracy" plotted by the witnesses against the prisoner, to the clearing away stains from the characters of the maid servants, to

the removal of imputations against the respectability of Madame Piolaine, and to the unloosing such epithets as "miscreant bloodhounds," and "inquisitorial ruffians" from members of the police — with all which various falsehoods Mr. Phillips had done his best to inoculate the jury. "Personal opinion" might have had the least possible to do with any of these charges; but the question whether the origination of such charges by any other means was allowable, still remains. Mr. Phillips avowed that he knew nothing, and could therefore have had no "personal opinion," of Madame Piolaine; but he nevertheless assumed a right to throw wicked aspersions on her, and did his best to render her discharge of a sacred social duty not matter of consolatory reflection, but of painful and degrading recollection. Mr. Phillips knew on Friday morning that his client had committed the murder although at midday on Saturday he solemnly asseverated that the Omniscient God alone knew who did it; and there was undeniably as much "personal opinion" in this as was required for the composition of a deliberate falsehood, with something like blasphemy to support it. On the other hand it needed no "personal opinion" to alarm the jury with threatened dangers to their eternal salvation; nor was it necessary that "personal opinion" should have had any thing to do with the dismissal of Sarah Mancer to a destiny hardly less dreadful than that of the murdered or the murderer. Personal opinion touches the whole question imperfectly. It is one of personal and professional morality.

Mr. Phillips charges the *Examiner* with having "invented" the accusations against him which have been under notice, and introduces slanderer, coiner, libel-mint, and the like Old Bailey epithets, into his tawdry and ill-written letter. These things do not affect us in the least. This journal is before the public from week to week, and for more than thirty years it has not appeared in a court of law to meet even a charge of libel. We know of nothing that should make us acknowledge interests superior to what we believe to be the public interests, and we take no fees to disturb our dreams. The only libeller affected in this case is Mr. Phillips himself, and the worst of his libels is that upon his own profession. Passages stand at the head of this article which will have told the reader what honorable men in practice at the bar have heretofore thought of the practice of Mr. Phillips; nor do we think it likely that their verdict, which may be said to have passed into history, has any chance of being now reversed. That a man may not defend a client whom he even knows to be guilty, we have never said. But if he does so, he is precluded from urging any thing in the case which the guilty man himself would not have had the right to urge. The barriers which the law has thrown up against illegal conviction are as fairly the safeguard of the guilty as of the innocent, but the advocate of the guilty has to stand with his weapons of defence at these alone. It is for the benefit of society that he should represent his client to the extent of giving him every advantage of his knowledge of law, of his skill in sifting evidence, and of his means of giving due significance to facts, but not, as we before remarked, to the extent of lying for him, far less of making false charges against others, or of blackening the character of witnesses whom he knows to have been speaking truly. This is no man's right. It cannot be possessed, and therefore

cannot be transferred. "No counsel," said Lord Langdale, in the case of Hutchinson *v.* Stephens, "supposes himself to be the mere advocate or agent of his client, to gain a victory, if he can, on a particular occasion. The zeal and the arguments of every counsel, knowing what is due to himself and his honorable profession, are qualified *not only by considerations affecting his own character as a man of honor, experience, and learning, but also by considerations affecting the general interests of justice.*" Is there any man of honor, experience, and learning, who does not agree with Lord Langdale?

Mr. Phillips naturally seeks a more congenial model, and appeals to a dictum of Lord Brougham, thrown out, as he bombastically phrases it, "even to the affronting of a king." Destroying the character of a maid-servant, we are simple enough to think, implies a higher stretch of moral recklessness than the affronting of a king; but we confess to little sympathy with the courage involved in either. "An advocate," said Lord Brougham, defending Queen Caroline, "by the sacred duty which he owes to his client, knows, in the discharge of that office, but one person in the world, THAT CLIENT AND NONE OTHER. To save that client by all expedient means — to protect that client *at all hazards and costs to all others*, and among others to himself — is the highest and most unquestioned of his duties; and *he must not regard the alarm, the suffering, the torment, the destruction, which he may bring upon any other.*" A more detestable doctrine than this, or one that, if generally acted on, would more surely break down the whole framework of society, it is impossible to imagine; and it would be unjust, even to Lord Brougham, to attribute it to any more deliberate origin than the profoundly parasitical desire to exaggerate the moral obligation which had forced him, in that special case, into opposition to George IV. It was reserved for Mr. Phillips to make it a common rule of practice; and, by such advocacy as that for Courvoisier, to separate himself forever, in fame and character, from the class of advocates described by Lord Langdale.

Bentham has compared the relation of barrister and client to a compact of guilt between two confederated malefactors; and what better would it be if duty to a client justified such revolting aggression upon the innocent, such wicked perversion of truth, such solemn asseveration of falsehood, such abuse of the tribunal and forms of justice into engines of the worst injustice, as were presented in the defence of Courvoisier by Mr. Charles Phillips.

WATERCOURSES. — A writer, in a recent number of the London Jurist, thus analyzes a recent decision in the court of Exchequer, relative to watercourses:

1. The right to use a natural stream is founded on the law of nature; not on any supposed grant. It is an incident to the land through which the stream flows, independent of the acquiescence of adjoining owners.

2. The right to artificial watercourses, *as against the parties creating them*, depends upon the character of the watercourse.

3. As between proprietors of land traversed by an artificial watercourse, a distinction must be taken between those cases where it flows into a

natural stream, and those where it does not; in the first instance, in favor of the riparian proprietors; in the second, against them.

4. The pollution of a natural stream, although it may not occasion actual damage, is *injuria absque damno*, and remediable at law.

5. Riparian proprietors may use a stream for domestic purposes only, without liability to an action; but this right is subject to a strict construction in England, and by no means so broad as in France and the United States.

See *Wood et al.* v. *Ward et al.* 13 Jur. 472.

Insolvents in Massachusetts.

Name of Insolvent.	Residence.	Commencement of Proceedings.	Name of Commissioner.
Ames, Emerson R.	Danvers,	Dec. 31,	John G. King.
Ballard, John G.	Ashland,	" 14,	Asa F. Lawrence.
Bacon, Asa	Charlton,	" 3,	Henry Chapin.
Beal, John H.	Boston,	" 8,	J. M. Williams.
Blackmar, Holland	Woburn,	" 14,	Asa F. Lawrence.
Blanchard, Thomas	Abington,	" 15,	Welcome Young.
Burroughs, George	Holliston,	" 20,	Asa F. Lawrence.
Clough, Carlos,	Lynn,	" 15,	John G. King.
Coburn, Lewis G.	E. Bridgewater,	" 8,	Welcome Young.
Coffin, Charles	Weymouth,	" 8,	Francis Hilliard.
Crafts, John W.	Boston,	" 3,	J. M. Williams.
Dearborn Albion, et al.	Quincy,	" 1,	J. M. Williams.
Ellis, Avery P.	Boston,	" 1,	J. M. Williams.
Falet, Benj. H.	Taunton,	" 13,	David Perkins.
Field, Lucius,	Cambridge,	" 1,	Asa F. Lawrence.
Foster, Joseph	Roxbury,	" 20,	Francis Hilliard.
French, James M.	Southboro',	" 13,	Henry Chapin
Fuller Warren,	Sharon,	" 19,	Francis Hilliard.
Green, George	Waltham,	" 8,	Asa F. Lawrence.
Gurney, John	Abington,	" 8,	Welcome Young.
Hammond, Elisha	W. Brookfield,	" 28,	Henry Chapin.
Harrington, David B.	Millbury,	" 28,	Henry Chapin.
Johnson, Andrew J.	Boston,	" 8,	J. M. Williams.
Lawrence, Joshua	Boston,	" 31,	J. M. Williams.
Marland, Sam'l & John & Manning, William S.	Andover,	" 3,	John G. King.
Marsh, Jonathan H.	Charlemont,	" 8,	D. W. Alvord,
McWright, Orris	Grafton,	" 28,	Henry Chapin.
Norwood Charles	Reading,	" 10,	Asa F. Lawrence.
Pierce, George	Lowell,	" 15,	Asa F. Lawrence.
Plummer, Enoch	Cambridge,	" 27,	Asa F. Lawrence.
Ropes, Gideon, jr.	Newbury,	" 14,	John G. King.
Rich, Peter, jr.	Shrewsbury,	" 27,	Henry Chapin.
Sawtelle, Charles	Bernardston,	" 21,	D. W. Alvord.
Smith, John J.	Springfield,	" 31,	George B. Morris.
Stamill, Carpenter	Chelsea,	" 10,	J. M. Williams.
Thayer, Austin E.	Williamsburgh,	" 13,	Myron Lawrence.
Tufts, Francis H.	Cambridge,	" 26,	Asa F. Lawrence.
Vining, Melvin	Boston,	" 18,	J. M. Williams.
White, Artemas	Somerville,	" 4,	Asa F. Lawrence.
White, Asa	Boston,	" 15,	J. M. Williams.
Williams, Albert G.	Rutland,	" 27,	Henry Chapin.
Williams, Giles	Worcester,	" 14,	Henry Chapin.
Williams, Joseph	Newburyport,	" 4,	John G. King.
Wright, Levi, jr.	Westford,	" 24,	Asa F. Lawrence.